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No. 281

In the Supreme Court of the United States

OCTOBER TERM, 1955

ROBERT M. NEWELL,
Petitioner,

vs.

GERTRUDE B. NEWELL,
Respondent

ROBERT M. NEWELL,
Petitioner,

vs.

THE HONORABLE D. H. SUTPHEN, as Judge of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, and THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING,
Respondents

Petition for Writs of Certiorari to the Supreme Court of the State of Idaho

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions	6
Statement	6
How Federal Question Was Presented	11
Reasons for Granting the Writ	13
Conclusion	
Appendix A—Memorandum decision of trial judge in Newell vs. Newell, Gooding County, Idaho	32
B—Opinion in Supreme Court of Idaho in Newell vs. Newell	47
C—Opinion in Supreme Court of Idaho in Newell vs. Sutphen, et al	61
D—Opinion of California District Court of Appeal in Newell vs. Newell	69
E—Findings of Fact, Conclusions of Law, and Decree in Newell vs. Newell, Los Angeles County, California, No. D-11260	78
F—Restraining Order in Newell vs. Newell, Los Angeles County, California, No. 629,775	85
G—Stipulation prior to trial in Newell vs. Newell, Gooding County, Idaho	88
H—Decree of Divorce in Newell vs. Newell, Gooding County, Idaho	91
I—Motion to Consider Evidence Dehors the Record, Supreme Court of Idaho	95
J—Motion to Vacate Hearing on Merits, Supreme Court of Idaho	102
K—Statutes: California Code of Civil Procedure, §417	105
Idaho Code, §32-701	

CITATIONS

CASES

Page

Allen vs. Superior Court, 41 Cal. (2d) 306, 259 P. (2d) 905 23

Atherton vs. Atherton, 181 U.S. 155, 45 L.ed. 794 24

Ex parte Bauman, 82 Cal. App. (2d) 359, 186 P. (2d) 154 26

Bee Machine vs. Freeman (CCA, 1, 1942), 131 F. (2d) 190, aff'd. 319 U.S. 448, 87 L.ed. 1509 28

Canavarro vs. Theatre & Amusement Janitors Union, Local No. 9, 15 Cal. (2d) 495, 101 P. (2d) 1081 19

Chamblin vs. Chamblin, 361 Ill. 588, 1 N.E. (2d) 73, 104 A.L.R. 1183 21

Cherry vs. Cherry, 208 Ga. 726, 69 S.E. (2d) 252 26

Cook vs. Cook, 342 U.S. 126, 96 L. ed. 146 ..... 18, 25

H. S. Cramer & Company vs. Washburn, 71 Idaho 421, 233 P. (2d) 809 16

Davis vs. Davis, 305 U.S. 32, 83 L.ed. 26, 118 A.L.R. 1518 21

Ewing vs. Gardner 341 U.S. 321, 95 L.ed. 968 30

Haddock vs. Haddock, 201 U.S. 562, 50 L.ed. 867 13

Hart Steel Co. vs. Railroad Supply Co., 244 U.S. 294, 61 L.ed. 1148 22

Heuer vs. Heuer, 33 Cal. (2d) 268, 201 P. (2d) 385 21

Johnson vs. Muelberger, 340 U.S. 581, 95 L.ed. 552 18

Leupe vs. Leupe, 21 Cal. (2d) 145, 130 P. (2d) 697 28

Milliken vs. Meyer, 311 U.S. 457, 85 L.ed. 278, 132 A.L.R. 1357. Rehearing denied 312 U.S. 712, 85 L.ed. 443 23

Newell vs. Newell, Idaho , 293 P. (2d) 663 2

Newell vs. Newell, 136 A.C.A. 792, 289 P. (2d) 22 2

Newell vs. Sutphen, 76 Idaho 148, 279 P. (2d) 405 2

Reynolds vs. Stockton, 140 U.S. 254, 35 L.ed. 464 16

S.E.C. vs. Otis & Co., 338 U.S. 843, 94 L.ed. 515 30

Sherrer vs. Sherrer, 334 U.S. 343, 92 L.ed. 1429 ..... 16, 21

CASES (Continued)

	Page
Simmons vs. Superior Court, 98 Cal. App. (2d) 119, 214 P. (2d) 844, 19 A.L.R. (2d) 288	20
Smith vs. Smith, 45 Cal. (2d) 235, 288 P. (2d) 497	23
Stafford vs. Field, 70 Idaho 331, 218 P. (2d) 338	16, 21
Tomkins vs. Tomkins, 89 Cal. App. (2d) 243, 200 P. (2d) 821	16, 21
Whitley vs. Spokane & Idaho Ry. Co., 23 Idaho 642, 132 P. 121; aff'd. 237 U.S. 487, 59 L.ed. 1060	20
Williams vs. North Carolina, 317 U.S. 287, 87 L.ed. 279 143 A.L.R. 1273	13, 14, 24, 30
Williams vs. North Carolina, 325 U.S. 226, 89 L.ed. 1577, 157 A.L.R. 1366. Rehearing denied, 325 U.S. 895, 89 L.ed. 2006	14, 24, 30
Wilson vs. Barry, 102 Cal. App. (2d) 778, 228 P. (2d) 331	27
Wolf vs. Gall, 174 Cal. 140, 162 P. 115	19

STATUTES

California Code of Civil Procedure, §417	6, 23, 24, 26
California Code of Civil Procedure, §2037	8
Idaho Code, §32-701	21
United States Constitution, Article IV, §1	4, 16
62 Stat. 929, 28 U.S.C. §1257(3)	3

MISCELLANEOUS

43 C.J.S. 503 (Injunctions, §50)	20
49 C.J.S. 37 (Judgments, §11)	28
50 C.J.S. 47 (Judgments, §620)	28

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THE HONORABLE D. H. SUTPHEN, as Judge of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, and THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING,
Respondents

Petition for Writs of Certiorari to the Supreme Court of the State of Idaho

Petitioner Robert M. Newell prays that writs of certiorari issue to review the judgments of the Supreme Court of the State of Idaho, entered in the case of Newell vs. Newell on February 26, 1956, and in Newell vs. Sutphen on June 14, 1956, these two cases being interrelated and presenting identical constitutional questions.

CITATIONS TO OPINIONS BELOW

The memorandum decision of the District Court for Gooding County, Idaho, unreported, in the case of Newell vs. Newell, is printed as Appendix A, infra p. 32.

The opinion of the Supreme Court of the State of Idaho in the case of Newell vs. Newell, No. 8289, is reported at Idaho , 293 P. (2d) 663, and is printed as Appendix B, infra p. 47.

The opinion of the same Court in the case of Newell vs. Sutphen, et al, No. 8231, is reported at 76 Idaho 148, 279 P. (2d) 405, and is printed as Appendix C, infra p. 61.

For reference, there is likewise included as Appendix D, the opinion of the District Court of Appeal of the State of California, in the case of Newell vs. Newell, dated November 2, 1955, unofficially reported at 136 A.C.A., 289 P. (2d) 22, infra p. 69.

JURISDICTION

The opinion of the Supreme Court of Idaho in the case of Newell vs. Newell, No. 8289, was filed January 13, 1956; a timely petition for rehearing was filed January 30, 1956, (R. 621); rehearing was denied February 27, 1956 (infra p. 47); and judgment was entered February 27, 1956 (R. 637). By order of Justice William O. Douglas of this Court, dated May 14, 1956, the time for filing petition for writ of certiorari in this cause was extended to and including July 26, 1956.

The opinion of the Supreme Court of Idaho in the case of Newell vs. Sutphen, et al, No. 8231, was filed January 19, 1955 (infra p. 61) and judgment was entered June 14, 1956 (R. 188).

Jurisdiction of this Court is invoked under 62 Stat. 929, 28 U.S.C., § 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review concern the failure of the courts of the State of Idaho to give full faith and credit to certain judgments of the Superior Court of Los Angeles County, State of California, and the action of the courts of the State of Idaho to permit the respondent to attack collaterally two California judgments.

The questions presented for review are set forth in three sections: (1) questions arising from the Idaho court's refusal to enforce the judgment of the California court in action number 629,775, wherein the respondent was enjoined and restrained from proceeding with her Idaho divorce action and from which she has appealed; (2) questions arising from the refusal of the Supreme Court of Idaho to consider certain proceedings which took place in the State of California after the respondent Gertrude B. Newell returned there; (3) questions arising from the Idaho courts' refusal to give any faith or credit to the petitioner's California interlocutory decree of divorce.

QUESTIONS ARISING FROM IDAHO COURT'S REFUSAL TO ENFORCE THE INJUNCTION AND RESTRAINING ORDER IN CALIFORNIA ACTION NUMBER 629,775.

1. Can an Idaho judgment, which accomplishes a successful collateral attack upon the Restraining Order and Injunction in California action number 629,775 (Appendix F, infra p. 85) be allowed to stand in the face of an unsuccessful direct attack thereon in the California appellate courts? May the Idaho court review the manner in which the courts of California apply the law of California in a collateral attack upon the California judgment?

2. Does the Full Faith and Credit Clause (United States Constitution, Article IV, Section 1) impose upon Idaho courts the duty to honor the injunction in California action number 629, 775 (Appendix F, infra p. 85), at least to stay Idaho proceedings until the disposition of the respondent's appeal in California?

3. Can jurisdictional questions litigated by respondent as plaintiff in California in action number 629,775, be relitigated in Idaho?

QUESTIONS ARISING FROM FAILURE OF THE SUPREME COURT OF IDAHO TO CONSIDER CERTAIN PROCEEDINGS IN CALIFORNIA WHICH OCURRED DURING THE PENDENCY OF APPEAL IN IDAHO

4. Could the Supreme Court of Idaho refuse consideration of the respondent's action seeking to modify

the California divorce decree, or of the decision of November 2, 1955 of the California District Court of Appeal affirming the judgment in action number 629,-775. (Appendix D, infra p. 69)

QUESTIONS ARISING FROM THE IDAHO COURT'S REFUSAL TO GIVE FULL FAITH AND CREDIT TO THE PETITIONER'S CALIFORNIA INTERLOCUTORY DECREE OF DIVORCE.

5. Was the petitioner's California decree of divorce (Appendix E, infra p. 83) entitled to full faith and credit in the courts of Idaho?

(a) Was the finding of the California court that the respondent was a resident of California when the California action was filed and when she was personally served with process subject to collateral attack? (Appendix E, infra p. 79).

(b) Was the finding of the California court that the respondent had appeared in the California action subject to collateral attack? (Appendix E, infra p. 78).

6. Could the Idaho courts refuse to give full faith and credit to the California divorce decree simply because that decree, final in all other respects, proscribed the remarriage of the parties for one year?

7. As a matter of comity, shouldn't the courts of one state remand a litigant to the forum of the marital domicile when litigation has been filed and served in the state of the marriage domicile within five weeks after the litigant left the state of the marital domicile?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this case are Article IV, Section 1, the Full Faith and Credit Clause.

STATEMENT OF THE CASE

Robert M. Newell, petitioner, and Gertrude B. Ralphs, formerly Gertrude B. Newell, were married on November 1, 1942 in Pasadena, California. The parties resided in the County of Los Angeles continuously until June 30, 1953, at which date they separated. On June 30, 1953, Gertrude B. Newell left California with the minor children of the parties, and after visiting in Montana until sometime after July 4, 1953, she drove to McCall, Idaho, arriving there about July 10, 1953. (Appendix A, infra p. 32.)

On August 17, 1953 the petitioner filed an action for divorce in the Superior Court of California, County of Los Angeles, entitled "Robert M. Newell vs. Gertrude B. Newell," number Pasadena D-11260. On August 24, 1953 the respondent, Gertrude B. Newell, was personally served in the State of Idaho with the summons, complaint and order to show cause re temporary custody and re restraining order in the California action (Appendix A, infra p. 33). This service was in accordance with California Code of Civil Procedure, Section 417, (Appendix K, infra p. 105) which section confers personal jurisdiction on a defendant who is personally served with process and who was a resident of the State of California at either the time of service or the date on which the action was filed. On August 26,

1953 respondent wrote a letter addressed to the judge of the California court who had issued the order to show cause, which letter denied the material allegations in the petitioner's complaint and the facts alleged in his affidavit in support of the order to show cause. After due notice to Gertrude B. Newell, her Los Angeles attorney and her Idaho attorney, the California court ruled that the respondent's letter be stricken from the files of the California action on the ground that it constituted an unverified answer to a verified complaint. See plaintiff's Exhibit P, transmitted with the Record on separate certificate.

Upon the failure of respondent to plead further her default was entered in the California action and on September 25, 1953 the Superior Court of Los Angeles County, a court of general jurisdiction, made its findings of fact and conclusions of law and rendered an interlocutory decree of divorce (Appendix E, infra p. 78).

The California court found that the respondent had appeared in the action and that she was a resident of the State of California on August 17, 1953, the date the California action was filed, and on August 24, 1953, the date on which she was personally served with process in the State of Idaho, and granted the petitioner a decree of divorce on the ground of extreme cruelty. He was also awarded community property and custody of the minor children. Consistent with the terms of the order to show cause personally served on the respondent theretofore, the California court restrained the respondent from pro-

ceeding further with her Idaho divorce action. (Exhibit P)

On August 22, 1953 the respondent filed for divorce in the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Gooding. (R. 412) On November 27, 1953, the petitioner filed answer in respondent's Idaho divorce action and attached to his answer exemplified copies of the California court's action above referred to. (R. 441)

On June 11, 1953 the respondent, Gertrude B. Newell, filed an action in the Superior Court of the State of California in and for the County of Los Angeles entitled "Gertrude B. Newell vs. Robert M. Newell," being number 629,775, requesting that the court issue subpoena to take the depositions of certain witnesses residing in Los Angeles County for use in her Idaho action. (R. 140) Pursuant to California Code of Civil Procedure, Section 2037, the subpoenae were issued. Thereupon the petitioner made a motion to quash the subpoenae and had issued an order to show cause wherein Gertrude B. Newell was required to show cause why she should not be restrained from taking the depositions or taking any further proceedings in her Idaho action, other than to dismiss it with prejudice. (R. 143)

The respondent filed affidavits in opposition to the motion to quash and to the order to show cause and after a full hearing, at which the respondent was represented by counsel, the California court on June 18, 1954 granted the motion to quash and on June 22, 1954 signed the restraining order and injunction (Appen-

dix F, (infra p. 85) which, after reciting the California decree of divorce, provided as follows:

> ". . . and it further appearing that the above named plaintiff [Gertrude B. Newell] *made a general appearance in said California action* and further that *she was a resident of the State of California on August 17, 1953 the date on which said California action was filed, and on August 24, 1953, the date on which she was personally served with process in said California action, and that said California judgment is a complete and final determination of all the issues before the court in that certain action filed by the above named plaintiff in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding,* entitled 'Gertrude B. Newell, Plaintiff, vs. Robert M. Newell, Defendant,' being Case No. 6462, and that *said California judgment is binding upon said Gertrude B. Newell in all particulars. "IT IS ORDERED, ADJUDGED AND DECREED that Gertrude B. Newell, the above named plaintiff, and Ernest W. Pitney and William H. Brawner, her attorneys, and any other attorney or attorneys now employed or hereafter employed by her are hereby restrained and enjoined from: . . . (3) Taking any further action or proceedings whatsoever in said Idaho action; (4) Taking any steps whatsoever for divorce in any court in any state or country leading to the entry of a divorce between the parties hereto or*

a determination of the rights of custody of the minor children of the parties hereto other than in the above entitled court, except to enter a dismissal with prejudice of said Idaho action." (Emphasis supplied).

These proceeding were placed before the trial court in supplemental answer prior to trial, and thereupon, on July 12, 1954, the date of trial, the petitioner moved the Idaho trial court to stay the Idaho proceedings pending the determination of the respondent's appeal therefrom in California. The trial court denied the motion. (R. 236)

On August 31, 1954, the Idaho trial court granted the respondent a decree of divorce, awarded her custody of the children, and gave her certain community property. (Appendix H, (infra p. 91) It also found the petitioner in contempt of court for having disposed of certain property which had been awarded to him as his sole and separate property by the California divorce decree.

As a result of this contempt action, petitioner commenced an original proceeding for prohibition or certiorari against the District Judge in the Supreme Court of Idaho. Writ of review was issued and recalled, but the trial judge was restrained from enforcing his contempt order pending determination of the appeal in the principal case, Newell vs. Newell. (Appendix C, infra p. 61) The restraint upon the trial judge was removed June 14, 1956 (R. 188).

Meanwhile, the respondent having remarried, she returned with the children to Los Angeles, California, in January, 1955, and on February 17, 1955, the respondent initiated proceedings in the California divorce action to modify the custody provisions thereof. This action was brought to the attention of the Supreme Court of Idaho in a Motion to Consider Evidence Dehors the Record (Appendix I, infra p. 95).

On November 2, 1955, the District Court of Appeal of the State of California affirmed the judgment in action number 629,775, which had enjoined the respondent from proceeding in Idaho (Appendix D, infra p. 69) and the petitioner moved the Supreme Court of Idaho to vacate the hearing on the merits, pending appropriate action on the respondent's part to comply with the injunction. (Appendix J, infra p. 102)

On December 28, 1955, the Supreme Court of California granted the respondent's petition for a hearing to review the aforementioned decision. (Appendix D, infra p. 69)

HOW FEDERAL QUESTION IS PRESENTED

The following is an itemization in chronological order of manner in which the petitioner submitted to the Idaho courts the question of the full faith and credit to be given the California judgments.

1. On November 27, 1953, by pleading in the petitioner's answer (R. 441) and on July 12, 1954 by supplemental answer (R. 494).

2. On July 12, 1954, the parties stipulated that this issue was presented. (Appendix G, infra p. 88)

3. On July 12, 1954, petitioner moved the Idaho trial court to stay its proceedings based upon the restraining order and injunction issued in California action number 629, 775 (R. 236).

4. On September 24, 1954, petitioner applied to the Supreme Court of Idaho for a writ of prohibition and/or certiorari to annul the judgment of contempt of the Idaho trial court. (R. 1)

5. Petitioner's appeal to the Supreme Court of Idaho assigned as error the trial court's failure to accord full faith and credit to the California judgment. Judgment affirmed February 27, 1956. (Appendix B, infra p. 50)

6. On April 20, 1955, the petitioner filed a motion in the Supreme Court of Idaho to consider the respondent's request to modify the California interlocutory decree of divorce. (Appendix I, infra p. 95)

7. On November 7, 1955, petitioner moved the Idaho Supreme Court to vacate the hearing on the merits based on the November 2, 1955 decision of the California District Court of Appeals. (Appendix J, infra p. 102) The motion was denied *de facto* by the court's proceeding with the hearing and its refusal to consider the aforementioned opinion of the California appellate court.

8. On January 30, 1956, petitioner requested a rehearing in the Supreme Court of Idaho and specifically requested the court to pass on the question of whether it granted or denied the petitioner's motion

to consider the affirmance of the restraining order by the California District Court of Appeals (R. 624).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In this case, without question, the marital domicile was California, and it is in California that all interested parties now live and pursue aspects of this controversy in California courts. The Idaho Supreme Court has sustained collateral attack upon two decrees of the marital domicile. And the Idaho Court has refused to give consideration, pending appeal, to conduct by the respondent with reference to the California divorce decree it has held void, wherein she has recognized and sought modification of such decree. And the Idaho Court has refused to give consideration to the opinion of a California appellate court upholding, as against direct attack, the self-same decree the Idaho court later determined could not withstand collateral attack.

Thus, as a first reason for granting the writ, petitioner calls attention to, and requests correction of the failure of the courts of Idaho to give any faith or credit to judgments of the Courts of California.

This failure raises questions of far reaching importance.

When this court overruled *Haddock vs. Haddock*, 201 U.S. 562, in the first *Williams* case, (*Williams vs. North Carolina*, 317 U.S. 287) it took a long step toward giving validity to divorce decrees rendered by the states which grant divorce decrees upon comparatively nominal residence periods. Perhaps no great

harm to society occurs when the parties to the marriage have settled their differences and agree on this sort of procedure. However, when the quick divorce state determines important rights in the face of and contrary to the result of litigation in the state of the marriage domicile where the parties have resided for many years fundamentally different considerations prevail: Which state has the greater interest in the matter? Which state is apt to reach the better decision? From the point of view of society in the thousands of similar cases that will arise, which state is the better forum in which to litigate the important and far reaching question involved in a contested divorce case?

When this court in the *Williams* cases (*Williams vs. North Carolina*, 317 U.S. 287, *Williams vs. North Carolina*, 325 U.S. 226) ruled that the quick divorce decree was subject to collateral attack in the courts of the marital domicile, it was, of course, implicit that some day a divorce decree of the marital domicile might be collaterally attacked in the courts of the forum of shorter residence. Necessarily involved is this fundamentally important question: By what standards is the decree of the marital domicile subject to collateral attack?

Is the rule the same as that in the *Williams* cases or does a different rule obtain? Is the decree of the marital domicile presumptively valid; if so, can it be attacked on any ground other than fraud in its procurement? Can the quick divorce state establish procedural rules by which what are really questions of law are turned into questions of fact, thereby thwarting effective appellate court review of a successful collateral

attack on the decree of the marital domicile? All of these questions are present in the case at bar.

In view of the consistent pattern of conduct by which the Idaho courts have refused to recognize or give any credit to final California judgments between the parties, if this decision of the Supreme Court of Idaho is allowed to stand, it will mean simply that any person faced with the prospect of adverse divorce litigation in his home state need simply get across the state line before he is served. Forum shopping will be a judicially approved activity for an errant spouse. In effect, this Court will be giving tacit approval to a degraded phase of our legal system, the wholesale granting of divorces, and will render it practically impossible for the states of the marital domicile to regulate the affairs of its citizens or protect the rights of their children.

This decision has immediate and important consequences to every state in the union as well as to the rights of the parties before this Court. This is readily apparent from a brief discussion of the questions for review, noted below in the order in which they were set forth above.

1. Can an Idaho judgment, which accomplishes a successful collateral attack upon the restraining order and injunction in California action number 629,775, be allowed to stand in the face of an unsuccessful direct attack thereon in the California courts?

A decision of the Supreme Court of Idaho holding that a California trial court erroneously applied the law of the California in the face of a decision of the California appellate courts affirming that judgment is

absurd and erroneous. This conflict of decisions can be resolved only by this Court.

It is settled law that when the courts of one state entertain a collateral attack on a judgment of the courts of another state, the only issue is whether or not the courts of the state rendering the judgment had jurisdiction over the parties and the subject matter of the action. Any claim that the court rendering the judgment erred in granting its judgment cannot be raised in a collateral attack. (*Sherrer vs. Sherrer*, 334 U.S. 343; *H. S. Cramer & Company vs. Washburn*, 71 Idaho 421, 233 P. (2d) 809; *Stafford vs. Field*, 70 Idaho 331, 218 P. (2d) 338; *Tomkins vs. Tomkins*, 89 Cal. App. (2d) 243, 200 P. (2d) 821.

At the time of the hearing of the motion to quash the subpoenae and the order to show cause re restraining order in California, the respondent filed affidavits opposing the motion and the order to show cause, was represented by counsel, and had a full opportunity to be heard on all of the issues in the case, including the applicability of all phases of the law of the State of California. This being so, it was beyond the province of the Idaho trial court to attempt to sit as a California appellate court and review the judgment of the California trial court. The rule was stated by this Court in the case of *Reynolds vs. Stockton*, 140 U.S. 254.

> "The requirements of that section [Sec. 1, Art. IV, U. S. Const.] are fulfilled when a judgment rendered in a court of one state, which has juris-

diction of the subject matter and of the person, and which is substantially responsive to the issues tendered by the pleadings, or is rendered *under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another state.*" (Emphasis added).

By way of judicial support for its unprecedented failure to respect and enforce the judgment of the California court in action number 629,775, the Supreme Court of Idaho in its opinion states:

> "Respondent produced as one of her witnesses an attorney at law, admitted to practice and for many years a practitioner in the courts of the State of California. He testified concerning the California law applicable to the proceeding, case number 629,775 . . ." (Appendix B, infra p. 58)

The Idaho trial court found in accordance with the testimony of the attorney witness, which findings of fact were upheld by the Supreme Court of Idaho. What the Idaho court has omitted from its declaration is that this expert witness was in fact her father (R. 215) and was one of her attorneys of record in the California action number 629,775 (Appendix F, infra p. 85). No ruling could be more effectively designed to subvert the fundamental import of the full faith and credit clause of the United States Constitution than a ruling which would permit the attorney for the losing party

in a law suit in a particular state to appear in another state and testify that in his opinion the court that rendered the judgment against his client was in error. Such a procedure is inconsistent with the mandate enunciated by this court in *Johnson vs. Muelberger*, 340 U.S. 581.

> "From judicial experience with and interpretation of the clause [full faith and credit], there has emerged the succinct conclusion that the Framers intended it to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum. The faith and credit to be given is not to be niggardly but generous and full. Local policy must at times be required to give way, such is part of the price of our federal system."

In the case of *Cook vs. Cook*, 342 U.S. 126, this Court said:

> "But the burden of undermining the decree of a sister state 'rests heavily upon the assailant.' "

What can be more ridiculous in any federal system than the picture presented by this case where an Idaho trial judge and the Supreme Court of Idaho ruled that a California trial judge erroneously applied the law of California, where at the same time the District Court of Appeal of the State of California affirmed the

California trial court and ruled that it correctly applied the California law. The ruling of the Idaho Supreme Court confronts this court with the phenomenon of conflicting decisions between the appellate courts of the State of Idaho and the State of California as to the validity of the California restraining order and injunction in action number 629,775. *Which of these judgments is entitled to full faith and credit?*

2. Does the Full Faith and Credit Clause impose upon Idaho courts the duty to honor the injunction in California action number 629,775 (Appendix F, infra p. 85), at least to stay Idaho proceedings until the disposition of the respondent's appeal in California?

The California order restrained respondent from:

> "Taking any steps whatsoever for divorce in any court in any state, or country, leading to the entry of a divorce between the parties hereto or a determination of the rights of custody of the minor children of the parties hereto other than in the above court, except to enter a dismissal with prejudice of said Idaho action." (Appendix F, infra p. 87)

On July 8, 1954, the respondent appealed in California. However, since the restraining order was a prohibiting one, its effect was not stayed by her appeal. *Wolf vs. Gall*, 174 Cal. 140, 162 Pac. 115; *Canavarro vs. Theatre Local No. 9*, 15 Cal. (2d) 495, 101 P. (2d) 1081. Under the full faith and credit clause, the courts of one state are to give the same force and effect

to a judgment of a sister state as it has in the state of its origin. *Whitley vs. Spokane & Idaho Ry. Co.*, 23 Idaho 642, 132 Pac. 121; affirmed 237 U.S. 487. Therefore, it was the duty of the courts of Idaho to respect the California restraining order and at least stay further proceedings until the respondent's appeal had been decided by the courts of California.

> "However, if the attention of the court is properly called to the fact that a party has been enjoined from proceeding, it will usually not permit the party to disobey the injunction, and will stay the proceeding out of respect for the court issuing the injunction."

43 C.J.S. 503 (Injunctions § 50)

See also:

Simmons vs. Superior Court, 98 Cal. App. (2d) 119, 214 P. (2d) 844, 19 A.L.R. (2d) 288.

3. Can jurisdictional questions litigated by respondent as plaintiff in California in action number 629,775, be relitigated in Idaho?

In action number 629,775, after a full hearing on the merits, the California court found that:

> ". . . the above-named plaintiff [Gertrude B. Newell] made a general appearance in said California action and further that she was a resident of the State of California on August 17, 1953, the date on which said California action was filed, and on August 24, 1953, the date on which she

was personally served with process in said California action, and that said California judgment is a complete and final determination of all of the issues before the court in that certain action filed by the above-named plaintiff in the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Gooding, entitled 'Gertrude B. Newell, plaintiff, vs. Robert M. Newell, defendant,' being case number 6462, and that said California judgment is binding on said Gretrude B. Newell in all particulars." (Appendix F, infra p. 85).

The finding of the California court that the respondent was a resident of California on August 17, 1953 was a finding that the Idaho court had no jurisdiction to entertain in the respondent's Idaho divorce action since she would not have met the minimum residence requirements. *Idaho Code, section 32-701.* Indeed, it is implicit in these finding that when she filed her Idaho divorce action on August 22, 1953, she was in truth and in fact a resident of the State of California.

Having litigated all of the jurisdictional facts in California, the respondent should not have been permitted to turn around three weeks later and relitigate these same issues in Idaho. The findings of the California court were res adjudicata and were themselves subject to the protection of the full faith and credit clause. *Sherrer vs. Sherrer*, 334 U.S. 343; *Davis vs. Davis*, 305 U.S. 32; *Heuer vs. Heuer*, 33 Cal. (2d) 268, 201 P. (2d) 385; *Stafford vs. Field*, 70 Idaho 331, 218

P. (2d) 238; *Tomkins vs. Tomkins*, 89 Cal. App. (2d) 243, 200 P. (2d) 821; *Chamblin vs. Chamblin*, 362 Ill. 588, 1 N.E. (2d) 63, 104 A.L.R. 1183.

4. Could the Supreme Court of Idaho refuse consideration of the respondent's action seeking to modify the California divorce decree, or of the decision of November 2, 1955 of the California District Court of Appeal affirming the judgment in action number 629,775. (Appendix D, infra p. 69)

On February 17, 1955, the respondent sought to modify the California interlocutory decree of divorce. This action is inconsistent with her claim that the California court had no jurisdiction over her person and this was pointed out in petitioner's motion to consider evidence dehors the record. (R. 558)

The petitioner requested that the Supreme Court of Idaho take note of this action and give it effect. (Appendix I, infra p. 95) Cf. *Hart Steel Co. vs. Railroad Supply Co.*, 244 U.S. 294. The Supreme Court of Idaho refused to pass on this motion or to consider the offered evidence. The petitioner has found no case that holds that the refusal of an appellate court to consider evidence dehors the record involves a constitutional question. However, the conduct of the Supreme Court of Idaho amounted to a refusal to give full faith and credit to final California judgments.

Related to this problem was the refusal of the Supreme Court of Idaho to consider the decision of November 2, 1955 of the California District Court of Appeal affirming the trial court in action number 629,-

775. (Appendix J., infra p. 102) Since it affirmed a prohibitory injunction, this decision was entitled to full faith and credit until reversed or modified by the California Supreme Court.

5. Was the petitioner's California decree of divorce (Appendix E, infra p. 83) entitled to full faith and credit in the courts of Idaho?

The circumstances of the filing and service of petitioner's divorce action against the respondent have been detailed. (Supra, p. 6). California Code of Civil Procedure, § 417, (Appendix K, infra p. 105) sets forth a procedure whereby the California court may obtain personal jurisdiction over a resident served outside the State of California. The constitutionality of such a statute has been upheld by this court. *Milliken vs. Meyer*, 311 U.S. 457. The California Supreme Court has upheld the constitutionality of § 417. *Allen vs. Superior Court*, 41 Cal. (2d) 306, 259 P. (2d) 905; *Smith vs. Smith*, 45 Cal. (2d) 235, 288 P. (2d) 497.

The California divorce court ruled that the respondent's letter to the court constituted an appearance. However, the Idaho courts relitigated this issue and ruled that the letter did not constitute an appearance.

The Courts of the State of Idaho permitted the respondent to attack collaterally the California divorce decree. The manner by which the Idaho trial court undertook this collateral attack, which method was affirmed and approved by the Supreme Court of Idaho, raises serious questions of constitutional law.

(a) The Collateral Attack on the Finding of the California Divorce Court that the Respondent was a Resident of California.

Since the petitioner was a resident of the State of California, the California court had jurisdiction to hear his divorce action. The wife was served in accordance with California law. Therefore, at least the in rem phases of the judgment were entitled to full faith and credit. *Atherton vs. Atherton*, 181 U.S. 155; *Williams vs. North Carolina*, 317 U.S. 287; *Williams vs. North Carolina*, 325 U.S. 226. The respondent was served in accordance with California Code of Civil Procedure, § 417. The Idaho decision raises these questions: Is the finding of respondent's residence in California subject to collateral attack? If so, what standard is it subject to collateral attack?

The first and second *Williams* cases stand for the proposition that a divorce decree rendered in one state is subject to collateral attack in another state, but only if it be shown that the litigant obtaining the divorce decree in the latter did not in good faith intend to be a resident of the state for the jurisdictional length of time. As a practical matter, this has meant that the courts of the marital domicile have refused to recognize divorce decrees from other states on the ground that the plaintiff in the quick divorce state perpetrated a fraud on the courts of that state by representing to them that he in good faith had been a resident of that state when the evidence—usually the acts of the plaintiff after obtaining the quick divorce decree—estab-

lished that in fact he never did intend to reside in that state.

Presumably the same standard would apply to an attempt by the quick divorce state to attack collaterally a decree of divorce of the marital domicile of the parties, i. e., a showing of fraud on the court by the one obtaining the divorce decree. In the case at bar it is not disputed that the petitioner was at all times a bona fide resident of the State of California. As regards the finding of the California trial court that the respondent was a resident of California, it was neither claimed nor proven by the respondent in the Idaho trial court that this finding of the California court was predicated upon a fraud perpetrated either on the court or on the respondent; nor was it contended that the finding was not supported by ample evidence. Indeed this finding was made after the respondent was served and had a full opportunity to be heard. She could even have made a special apearance in the State of California and litigated the issue of her residence without subjecting herself further to the jurisdiction of the California court. In the absence of a showing of some fatal defect in the California procedure or a showing of fraud perpetrated on the California court, this Court should hold that such a finding is not subject to collateral attack. *Cook vs. Cook*, 342 U.S. 126.

Conversely, if the finding is subject to collateral attack, was the method followed by the Idaho court legally sufficient, i. e., the respondent simply testified that she intended to live in the State of Idaho for the six weeks period prior to her filing the Idaho divorce ac-

tion without any reference whatsoever to the finding of fact of the California court. If upheld, such a decision would substantially undermine the efficacy of statutes similar to California Code of Civil Procedure, §417. For example, in the case at bar, the respondent had been absent from the State of California for approximately six weeks when she was served with process in the California action. Shouldn't she be compelled to litigate the question of her then residence in the State of California or risk the consequences? Furthermore, if this Court upholds a later collateral attack on such a finding as to her residence, shouldn't her collateral attack be based upon something more than a contradiction of evidence offered before the California court, before the finding of the latter court will be overthrown?

(b) The finding that the Respondent made an Appearance in the California action is not Subject to Collateral Attack.

The courts of Idaho ruled that the letter written by the respondent to the California court did not constitute an appearance *in California*, contrary to a recital in the California divorce decree that it did constitute an appearance. It is settled law that what constitutes an appearance is purely a question of local law. *Cherry vs. Cherry*, 208 Ga. 726, 69 S. E. (2d) 252. See by analogy *Ex Parte Bauman*, 82 Cal. App. (2d) 359, 186 P. (2d) 154. For example, the California courts have even held that merely signing an affidavit in support of a motion for summary judgment constitutes a gen-

eral appearance. *Wilson vs. Barry*, 102 Cal. App. (2d) 778, 228 P. (2d) 331.

Therefore, there is no authority for the Idaho trial court to hold that the California court erred in ruling that the respondent, by interjecting herself into the California litigation by means of her letter, made an appearance. This decision should be one exclusively for the California courts. Furthermore, even if the California court had erred in its decision, the California court had jurisdiction to determine the legal effect in California of the respondent's communication to the court. Any decision it made would be within its jurisdiction and not subject to collateral attack.

The error of the Idaho court's decision can be illustrated by looking at the matter from a different viewpoint. Suppose, for example, the petitioner had done nothing with reference to the letter the respondent sent to the California court. Instead, that letter remained in the file of the California divorce action and the petitioner went ahead and took the respondent's default. Suppose further that the Idaho court had set aside this California default decree on the ground that it was void because it had been entered at a time when there was an answer on file. No doubt the Supreme Court of Idaho would have affirmed such a ruling of the trial court. In other words, if it would have been proper for the Idaho court to have ruled that the letter constituted an answer in California, it would be equally proper for the California court to rule that this letter constituted an answer, which is just what the California court did.

6. Could the Idaho courts refuse to give full faith and credit to the California divorce decree simply because that decree, final in all other respects, proscribed the remarriage of the parties for one year?

In construing the California decree of divorce the Idaho trial court and the Idaho Supreme Court seized upon the word "interlocutory" in its title and ruled that it did not have to give full faith and credit to the California decree because it was not a final decree. However, the law is clear that the question of the substance and effects of a judgment is to be determined by the four corners of the judgment and not by any label that it may contain. 49 C.J.S. 37 (Judgments, §11); 50 C.J.S. 47 (Judgments, §620). A fair reading of the findings of fact and conclusions of law and the interlocutory decree of divorce of the California court establishes without question that a California interlocutory decree of divorce is a valid determination of all of the issues of fact between the partise and is final in all particulars, except that the parties are not free to remarry for the passage of one year's time. Furthermore, where a judgment is partly final and partly interlocutory, the final provisions are entitled to full faith and credit. *Bee Machine vs. Freeman* (C. C. A. 1, 1942), 131 F. (2d) 190, affirmed 319 U.S. 448.

It is, of course, the settled law of the State of California that an interlocutory decree of divorce is a final judgment. *Leupe vs. Leupe*, 21 Cal. (2d) 145, 130 P. (2d) 697. The Idaho Supreme Court has attempted to justify its opinion by stating that it does not take

judicial notice of the law of sister states. Then the court stated:

> "Appellant contends that because of the peculiar California statutory law and construction thereof by the California courts, the interlocutory judgment is in fact valid and entitled to full faith and credit. Appellant neither pleaded nor proved such California law and the Idaho trial court found that he had not, and correctly held that the Idaho law controlled." (Appendix B, p. 51)

But there was no question but that the California court was one of general jurisdiction, and it is submitted that the judgment stands entitled to full faith and credit within its four corners, not to be condemned by its title. See Exhibit K, transmitted with the record under separate certificate from the clerk of the trial court, for evidence before the trial court in the law of California.

7. As a matter of comity, shouldn't the courts of one state remand a litigant to the forum of the marital domicile when litigation has been filed and served in the state of the marriage domicile within five weeks after the litigant left the state of the marital domicile?

The petitioners' California divorce action was filed before the respondent had completed her statutory six weeks in Idaho. She was served with process in the California action two days after she had filed in Idaho. Under these circumstances, the courts of Idaho, as a matter of comity, should have recognized that the California courts were in a much better position to

reach a just decision in the matter than their courts. It would serve no useful purpose to transport all of the witnesses to Gooding, Idaho. In undertaking to decide such an important question as the custody of children of these persons, Idaho must realize that its decision will be of little concern in the state where the children have always resided and to which they will return and which has the major responsibility of correctly deciding the custody claims of their parents.

As a matter of comity, the courts of the quick divorce states should, other things being equal, defer to the courts of the marital domicile when parallel litigation is being prosecuted in the respective states.

In summary, the decision in question raises very serious questions as to the effect of the full faith and credit clause in interstate divorce litigation. These questions were implicit in the *Williams* cases and should be resolved at this time in order to settle these questions. Furthermore, only this Court can resolve the conflict between the appellate courts of Idaho and California as to the validity and effect of the petitioner's California divorce action and the restraining order in action number 629,775.

In view of the fact that the decision of the Supreme Court of California on the respondent's appeal to that court in action number 629,775 may be expected in the next few weeks and since it could well determine the issue, this case could well be one for summary disposition. *S. E. C. vs. Otis & Co.*, 338 U. S. 843; *Ewing vs. Gardner*, 341 U.S. 321.

CONCLUSION

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted,

DON J. MCCLENAHAN,
JOHN A. CARVER, JR.,
ERNEST J. ZACK,
Counsel for Petitioner.

APPENDIX

Appendix A

IN THE

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO,

IN AND FOR THE COUNTY OF GOODING

GERTRUDE B. NEWELL, *Plaintiff,* vs. ROBERT M. NEWELL, *Defendant.*	Memorandum Decision No. 6462

This is a divorce case started in our Gooding County Court on August 22, 1953 on complaint of the wife. The case was tried on its merits July 12 to 13, 1954, inclusive, and taken under advisement upon briefs to be submitted by counsel. The requested briefs have now been lodged in chambers and the case fully submitted.

At this time I want to thank counsel for their prompt submission of briefs and the thorough and careful consideration they have given the issues presented by the evidence before the Court.

Briefly, the evidence discloses that on August 17, 1953, just five days before the wife filed her action in our court, the husband filed a complaint for divorce against her in the Superior Court of California, in

and for Los Angeles County. Service of summons in such action was made upon the wife at McCall, Idaho on August 24, 1953, and under date of August 26, 1953, the wife, without knowledge of her counsel, wrote a letter to the Honorable Allen T. Lynch, one of some 80 judges of the Los Angeles County Superior Court, which letter the husband now largely relies upon in support of his contention that the wife appeared therein and the California court acquired personal jurisdiction over her and the children. This letter was placed in the files of the California divorce case by some one, presumably Judge Lynch, and thereafter on motion of counsel for the husband, was ordered stricken from the files. Thereafter, on September 25, 1953, the action was heard by the Honorable Kurtz Kauffman, a judge of said California court, as a default and as of said date (Sept. 25, 1953) Findings of Fact and Conclusions of Law were filed and an Interlocutory Judgment of Divorce entered, which judgment granted the husband an interlocutory divorce and also purported to award to him the custody of the minor children of the marriage, and awarded him as his sole and separate property, certain real and personal property in California, and also a 1953 Buick Estate Wagon automobile then being in the State of Idaho.

On June 4, 1954, the husband started special statutory proceedings in the Superior Court of California (Case No. 62945) to obtain subpoenas to take depositions of witnesses in California for use in the divorce case pending before the Court in Idaho, and on June

11, 1954, a similar proceeding (Case No. 629775) was started in the same California court by counsel for the wife, for the taking of depositions of witnesses on her behalf at the trial in the instant case.

In the proceeding had in the Los Angeles County Superior Court in case No. 629775, the husband appeared and on June 18, 1954, secured a ruling by that court, as shown by that court's minute entry, granting his motion to quash the subpoenas and restraining the wife from taking depositions in Los Angeles County to be used in the Idaho case, and thereafter, under date of June 22, 1954, the presiding Judge in such case appears to have signed, and thereafter filed in such California proceedings, an order restraining the wife and her attorneys from taking depositions of any witnesses for use in the Idaho action; and such order further purports to restrain the taking of any further action or proceedings whatsoever in the instant case here in Idaho, or in the taking of any steps for divorce in any court in any state or county, or for a determination of the rights of custody of the minor children of the parties.

The instant case came on duly for trial in open court before the undersigned Judge on July 12, 1954 and at such trial certified copies of all the above referred to proceedings had in the Superior Court of Los Angeles County, California, were introduced and admitted in evidence. Both the husband and the wife, as well as other witnesses were sworn and testified and numerous exhibits introduced.

Briefly, in addition to the foregoing, the facts in evidence disclose that the parties were married in Pasadena, California, on November 1, 1942 and thereafter lived together in that vicinity until June of 1953, when the wife left her husband, taking their three children, Robert M. Newell, then age nine and one-half years, Christine Lindsey Newell, then six years old, and William Charles Newell, then two years old, with her. On July 1, 1953, the wife, accompanied by her father and the three children, arrived in Twin Falls, Idaho, it then being the wife's intention to make Idaho her permanent home and to abandon her former home in California. While in Twin Falls, on July 1, she made arrangements for the lease of a home at McCall, Idaho, but as the leased premises would not be available until after the Fourth of July, she went with her father to the neghboring state of Montana to visit relatives there over the Fourth, returning to Idaho sometime between the 8th and 10th of July, 1953, where she and the children have ever since continued to reside.

The evidence is clear that during the time these parties lived together as man and wife, the husband treated his wife with extreme cruelty, inflicting upon her grievous mental and physical sufferings as alleged in the wife's complaint herein, the wife clearly having grounds for divorce because of the husband's extreme cruelty. At the time she left him, in June, 1953, she was personally afraid of him and who was also afraid that he might take the children away from her. The charges of the husband in his answer as to the wife's

misconduct were not established by the evidence and appear to be false.

While such facts before us do not appear to be in serious dispute, counsel have raised some very interesting points of law. First, as to the effect of the husbands having first filed divorce action in California. In the rather recent case of Mulvey vs. Mulvey (1951) 228 Pac 2 452, which was a case where subsequent to husband's commencement of divorce action in Utah, the wife commenced divorce proceedings in Colorado, the Supreme Court of Colorado held that:

> Pendency of divorce proceedings in a foreign jurisdiction by defendant husband was not a bar to divorce proceedings brought by the wife prior to the rendition of decree of divorce in foreign state.

3 Nelson on Divorce p. 128 Sec. 28.06 states:

> Where the interlocutory decree system prevails, there is no severance of the ties of matrimony until the decree becomes final by lapse of time or a final decree is entered. See also De Freece vs. Industrial Accident Commission of California 80 P. 2 129.

Counsel for defendant contend, however, that the California interlocutory decree of divorce before us for consideration, is a final judgment and is entitled to full faith and credit. In Mason vs. Pelkes 57 Idaho 10 at page 33, our Supreme Court has said:

> Article 4, sec. 1 of the Constitution of the United States requires that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, but this provision does not preclude inquiry into the jurisdiction of the court in which the judgment was rendered, or into the facts necessary to give such jurisdiction; nor are the courts of a state required to give full faith and credit to a judgment rendered by a court of another state which had no jurisdiction of the subject matter or of the parties.

And in the case of Brown vs. Fletcher's Estate 52 L. ed. 996 at 970 Justice Brewer of the Supreme Court of the United States said, "Even record recitals of jurisdictional facts do not preclude oral testimony of those facts."

Now, as a matter of fact, the wife was a resident of Idaho and not of California at the time of service of summons upon her. Service was had upon her in Idaho and not in California. All the husband here has to rely upon to support his contention that there was a personal appearance by the wife is the fact that she wrote the letter, above referred to, to Judge Lynch, and that it was found in the files of the California case. It was not filed by the wife or her attorneys nor were filing fees paid, and it was stricken from the files by the California Court. Certainly, it can not now be relied upon as a personal appearance. Judge Lynch was just one of some 80 trials judges of the Superior court. He, of course, had no power to act on the wife's

behalf. At most it could only be construed as an admission of service, which clearly was not had within the state of California.

In Rutherford vs. Bentz 104 N.E. 2d 343, the Court said:

> The plaintiffs contend that the telegram sent by the defendant Bentz to the Circuit Court Judge of Champaign County was a general appearance. We do not think so. We agree with the law announced in Feltenstein vs. Stein, 51 Ill. App. 426, where it is said that the judge is not the court. The court is a legal entity, created by the Constitution and the judge is the presiding officer only. Under our system, there are three judges of a Circuit Court. Each of these judges when he presides, holds court. A telegram to either of these judges or a letter, while addressed to the judge, as the judge of the Circuit Court of Champaign County, is to the individual and not the court.

I am of the opinion that the California court did not have personal jurisdiction over the wife at the time of rendering the interlocutory decree here in question.

In the recent case of May vs. Anderson (1953) 345 U.S. 529, 79 Sup. Ct. 80 where the question before the court was whether, in a habeas corpus proceeding attacking the right of a mother to retain possession of her minor children, an Ohio court must give full faith and credit to a Wisconsin decree awarding custody of the children to their father when the decree

is obtained by the father in an ex parte divorce action in a Wisconsin court which had no personal jurisdiction over the mother, the Supreme Court of the United States answered No, holding that "the full faith and credit clause of the federal constitution and the Act of Congress passed pursuant to it do not entitle judgment in personam to extraterritorial effect where judgment was rendered without jurisdiction over person sought to be bound," and that "a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony, as regards effect of ex parte divorce decree which awards custody of children to father." The Court in that case also said:

> Generally, the domicile of children is that of the parent with whom they live, and only the state of that domicile may award their custody.

I am of the opinion that the interlocutory decree here in question is not to be given full faith and credit in so far as it purports to award the custody of the children to the father, nor is it to be considered as a final decree of divorce such as would prevent this court from granting a divorce to the wife herein.

Next considering the legal effect of the restraining order entered in case No. 629775, which order is now on appeal to a higher California court: It is not contended by the husband that this restraining order can have any direct effect on this court (Defendant's Brief, page 4) but it is contended that such injunction is

entitled to extraterritorial recognition in the sound discretion of the Court, and that this court should stay further proceedings in the instant case pending determination of the California appeal.

The proceeding on which such restraining order was entered was a special statutory proceeding to obtain subpoenas to take depositions of witnesses in California for use in our Idaho court, and the law of California is that special proceedings established by statute must strictly follow that statute, and a court sitting thereon has no general equitable jurisdiction. 1 Cal. Jur. 2d, p. 635 Pasadena vs. Porter, 257 p. 526, 53 A.L.R. 679 at 684.

It appears to me that the California court had no further jurisdiction in said proceeding than to grant or deny the application for the requested subpoenas. I am of the opinion that in the exercise of sound judicial discretion, this Court should not in the instant case either stay the proceeding in our court or hold up its decision of the case on its merits.

The husband has also raised the question as to whether the wife had in fact established residence in Idaho for the statutory period of six weeks prior to the commencement of this action. Section 32-701 Idaho Code provides:

> A divorce must not be granted unless the plaintiff has been a resident of the state for six full weeks next preceding the commencement of the action.

Section 32-702 provides:

> In actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife does not apply. After separation each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions.

There is no question in my mind but that the wife came to Idaho with the intent of establishing her domicile here. Clearly six full weeks had expired at the time of filing her complaint. In Robinson vs. Robinson 70 Idaho 122 at 129, our Supreme Court quoted the following language with approval:

> "The moving from one place of residence to another place with the intent to abandon the old residence and establish a residence at the new place, is in law a change of residence, which may be accomplished in one day * * * Burke County vs. Oakland, supra, 56 N.D. 343, 347, 217. N.W. 643, 645."
>
> Schillerstrom vs. Schillerstrom, N.D., 32 N.W. 2d 116, 2 A.L.R. 2d 281.

It was stipulated and the Court finds that the wife is a fit and proper person to be awarded the custody and care of the three children of the parties and I am of the opinion that she should be awarded the custody of the children and the community prop-

erty of the parties over which this court may have jurisdiction.

The husband is a practicing attorney at law in Los Angeles County, California, earning about $10,000.00 a year before income taxes. I am also of the opinion that this court should grant the wife a divorce as prayed for in her complaint and that the court should require the defendant to pay $500.00 towards plaintiff's attorneys fees incurred herein, in addition to the $200.00 heretofore paid thereon, and her costs incurred in securing exhibits introduced in evidence, and other costs, if any, in excess of the $100.00 expense money heretofore paid by defendant. The defendant should also be required to pay plaintiff for the support of the children, the sum of $75.00 per month per child during the minority of such children or until further ordered by the Court, which sum should be paid the 1st day of each and every month hereafter.

Now as to the issues submitted relative to the Buick Estate Wagon and the hearing on the order to show cause why defendant should not be punished for contempt of this court for violation of the order of January 15, 1954 relative to the 1953 Buick Estate Wagon. This matter was heard at the same time as the trial of the case on its merits, July 12 and 13, 1954, ruling thereon was at that time reserved and the Court requested briefs on that subject, as well as on the other issues presented.

The evidence discloses that the wife brought the station wagon with her when she came to Idaho and

had it in her possession on January 15, 1954 when this Court entered an order reserving ruling on defendant's motion for the awarding of the estate wagon to him, giving defendant the right to have possession of it pending further order of the Court, such order also contained this language:

> IT IS FURTHER ORDERED That defendant be and hereby is directed and ordered to surrender said Station Wagon to the plaintiff or to the custody of the Court, upon Notice by the Clerk of this court.

The husband then took the Estate Wagon to California, where on or before March 3, 1954, he sold it, it appearing that the community property equity of the plaintiff and defendant in the station wagon was of the value of $825.00.

At the hearing on January 15, 1954, at which time the above vehicle's order was entered at the suggestion of defendant's counsel, the court granted defendant the privilege of addressing the Court, during the course of which remarks the defendant said:

> I have generally appeared in Idaho, the car will be before the Court to decide. All I want to do is use it during the windup of this affair unless the Court follows the judgment and awards it to me conclusively. I need it in my business, particularly because there is no public transportation from where I live. I teach law school two nights a week and have to be down town in Los Angeles.

It appears that the interlocutory decree of divorce heretofore mentioned as having been entered by the Superior Court of Los Angeles County, California under date of Sept. 25, 1953 awarded the Buick Estate Wagon, such estate wagon was not in California and had not been in California at any time during the pendency of such action but was in Idaho at such time, and up until after our order of January 15, 1954 when defendant took it to California with him.

It is clear that if we are correct in our determination that there was no personal appearance by the wife in the California divorce action, then the California Court had no extraterritorial jurisdiction over the Buick Estate Wagon and its award of such wagon to the husband is not entitled to full faith and credit. Nor can defendant rely upon such decree as a defense, he having subjected himself to the jurisdiction of our Idaho court.

Counsel for the husband now say that defendant cannot be held guilty of contempt in this matter until the Clerk of our court has served him with notice to return the Buick Estate Wagon as required by the order.

In this case the husband, by his sale of the car, has made it impossible to return the estate wagon to Idaho, and the law does not require this Court to give notice to do some impossible thing.

On April 27, 1954, the same date that counsel for the wife filed affidavit in support of the show cause order here under consideration, the wife filed a mo-

tion in our court to amend her complaint herein by striking from Paragraph VI of said complaint the following words, comprising the first line of said paragraph, to-wit:

> comprising automobiles, an equity in the house and other personal property.

The paragraph would then read:

> There is a small amount of community property, the exact amount of which is unknown to plaintiff but plaintiff is entitled to have same decreed to her.

These filings were made considerable time after defendant had sold the automobile and the amendment was clearly not made with any idea of surrendering this court's jurisdiction to require restitution of the community property interest of the parties to the estate wagon in question.

It is the opinion of the Court that the defendant, Robert M. Newell, should be found guilty of contempt of this court because of his violation of the order heretofore made on January 15, 1954 and his sale of the Buick Estate Wagon.

I am, however, of the opinion that if the defendant shall, within 30 days after the date of the decree to be entered herein, pay to the plaintiff the sum of $825.00, found by the Court to be the community property equity, that the parties had in the automobile at the time of sale, the Court will consider that by

making such payment, the defendant has purged himself of such contempt. However, if such payment be not so made, then in such case the defendant should be required to appear before this Court on the 31st day following the date of entry of judgment herein or at such other time as the Court may fix for pronouncement of judgment for such contempt.

Counsel for plaintiff will kindly prepare for my signature, suitable Findings of Fact, Conclusions of Law, and Judgment and serve copy thereof on Counsel for defendant, who may, within three days thereafter, file objections or requests for modification if they desire to do so.

Dated this 16th day of August, 1954 at Gooding, Idaho.

D. H. SUTPHEN,
District Judge

Appendix B

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 8289

GERTRUDE B. NEWELL, *Plaintiff-Respondent,*

vs.

ROBERT M. NEWELL, *Defendant-Appellant.*

Rehearing denied Feb. 27, 1956.

SMITH, JUSTICE

This appeal is designed to test the jurisdiction of the trial court to grant a divorce to respondent, Gertrude B. Newell, and to award her the custody of minor children, in view of an existing interlocutory judgment of divorce granted appellant, Robert M. Newell, by the Superior Court of California, in and for Los Angeles County, and further decree in that action awarding to him the custody of the minor children.

Respondent and appellant were married in the State of California November 1, 1942. Three children were born as the issue of their marriage.

June 10, 1953, respondent accompanied by the children left California and, after visiting relatives in Montana, arrived at McCall, Idaho, about July 10, 1953.

August 17, 1953, appellant commenced an action for divorce against respondent in the Superior Court

in and for Los Angeles County, California, Case No. D-11260. August 24, 1953, respondent was served in Idaho, with process issued out of said California court and cause, but she did not appear personally in that action. September 28, 1953, the California Superior Court granted appellant an interlocutory judgment of divorce, with the right to a final decree of divorce after the expiration of one year; set over to him the community property of the parties; awarded to him the custody of the children, and ordered respondent to deliver the children forthwith to him.

August 22, 1953, respondent commenced an action for divorce against appellant in the District Court of the Fourth Judicial District in and for Gooding County, Idaho. Simultaneously with the filing of the complaint, the Idaho court issued its restraining order directed to appellant, which reads:

> IT IS HEREBY ORDERED, that Defendant, Robert M. Newell be and hereby is restrained and enjoined during the pendency of this action and until further order of this Court from molesting plaintiff, entering her home, or otherwise interfering with the custody and care by Plaintiff of the three children, Robert M. Newell, Christine Lindsey Newell, and William Charles Newell, or from taking said children out of the State of Idaho.

The restraining order was served on appellant September 14, 1953.

Appellant made a general appearance in the Idaho court and cause, and litigated the same on its merits.

June 22, 1954, the aforesaid California superior court, in Case No. 629775, a special proceeding commenced by respondent for a commission and subpoenae to take depositions, entered an order restraining respondent from taking depositions of witnesses for use in her Idaho divorce action, and from proceeding any further in the Idaho action.

While the pleadings are voluminous, as is the evidence, the parties at the time of trial, July 12, 1954, were able to clarify their respective positions and the issues involved.

They stipulated that their three minor children were corporeally in Idaho in the care of respondent, their mother; also that respondent is a fit and proper person to be awarded the custody of the children, if the Idaho court has jurisdiction to make a custody award to her.

Appellant urged lack of jurisdiction of the Idaho court to grant respondent any relief in her divorce action because the California Superior Court in and for Los Angeles County, in the case of Robert M. Newell, plaintiff, vs. Gertrude B. Newell, defendant, No. D-11260, entered an interlocutory judgment of divorce in favor of Robert M. Newell (September 28, 1953), and in Case No. 629775, Gertrude B. Newell, plaintiff, vs. Robert M. Newell, defendant, entered a restraining order and injunction (June 22, 1954, restraining Gertrude B. Newell from taking depositions for use in her pending Idaho divorce action and from proceeding any further in said action). Appellant in-

troduced in evidence authenticated copy of said proceedings, subject to respondent's objections to the validity and effect thereof.

Appellant alleged that said California judgment and order are final and conclusive, entitled to full faith and credit, res judicata and not subject to collateral attack in Idaho. He replied upon said proceedings in bar of respondent's divorce action commenced in Idaho.

Respondent asserted that the Idaho court not only was not precluded by the California proceedings, but it had jurisdiction to determine the issues involved in respondent's Idaho divorce action.

Appellant neither pleaded nor proved any California law. Respondent on the other hand proved certain California law in instances hereinafter referred to and was allowed amendment of her pleadings to conform to her proof.

August 31, 1954, the trial court made and entered its findings of fact and conclusions of law. The court by its judgment, made and entered the same date, granted a divorce to respondent from appellant and awarded to her the custody of the children; also ordered appellant to make certain payments to respondent, for child support; for respondent's community share of a certain automobile of which the court obtained jurisdiction in Idaho, and for attorneys fees and costs. The court then further decreed as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court has considered

and recognized the interlocutory decree of divorce made and entered in the Superior Court of the State of California in and for the County of Los Angeles, Pasa-D-11260 on or about September 25, 1953, between the parties hereto and that the same be, and hereby is, declared and decreed to be interlocutory, ex parte or default, not final and on substituted service and is not res judicata or entitled to full faith and credit;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court has considered and recognized the restraining order in the special proceeding in said California Court, No. 629775, and the same be, and hereby is, declared and decreed to be not final and to have been issued without jurisdiction, not responsive to or within the special proceeding involved, not res judicata, not entitled to full faith and credit, and is a nullity;

The determinative issue on appeal, as stated by the parties, is whether the trial court properly exercised jurisdiction in the face of both the existing interlocutory judgment of divorce granted appellant by the California Court, and that Court's order restraining respondent from proceeding further in her Idaho divorce action.

The California Interlocutory Judgment

Appellant contends that because of the peculiar California statutory law and construction thereof by the

California courts, the interlocutory judgment is in fact final and entitled to full faith and credit. Appellant neither pleaded nor proved such California law and the Idaho trial court found that he had not, and correctly held that the Idaho law controlled. I.C., secs. 9-101, 9-304, 9-307 and 9-308. Moore vs. Pooley, 17 Idaho 57, 104 P. 898; Cummings vs. Lowe, 52 Idaho 1, 10 P. 2d 1059; Mason vs. Pelkes, 57 Idaho 10, 59 P. 2d 1087, Cert. denied 299 U.S. 615, 81 L. ed. 453; Johnson vs. Falen, 65 Idaho 542, 149 P. 2d 228; Cole vs. Cole, 68 Idaho 561, 201 P. 2d 98. The rule is succinctly stated in Maloney vs. Winston Bros. Co., 18 Idaho 740, 763, 11 P. 1080, with a wealth of supporting authorities, in the following language:

> We cannot take judicial notice of the laws of a sister state. In the absence of pleading and proof as to what the laws are in a sister state, we must assume that the same law prevails in the foreign state that prevails here.

Appellant concedes that unless the California interlocutory decree is final it is not entitled to full faith and credit. A marriage is dissolved in Idaho only by death of one of the parties or by judgment of a court of competent jurisdiction declaring a divorce of the parties. I.C., sec. 32-601. The effect of a judgment decreeing a divorce is to restore the parties to the estate of unmarried persons. I.C., sec. 32-602.

Interlocutory means provisional, only temporary, not final; not a final decision of the whole controversy;

made or done during the progress of an action; intermediate order. Black Law Dictionary, 3rd ed.; Webster New International Dictionary, 2d ed.

The divorce laws of Idaho make no provision for an interlocutory judgment of divorce, I.C., Title 32, chs. 6, 7 and 8; nor recognize the right to a divorce from bed and board. Radermacher vs. Radermacher, 61 Idaho 261 at 269, 100 P. 2d 955.

No interlocutory judgment or decree is recognized as final or appealable in this state, except an interlocutory judgment in an action for partition of real property. I.C., sec. 13-201.

Under the laws of Idaho, which we must apply herein, the interlocutory judgment is not final. Where a judgment or decree is not final as measured by the laws applicable to it, it is not entitled to full faith and credit. Board of Public Works vs. Columbia College, 17 Wall. 521, 21 L. ed. 687.

The trial court considered the interlocutory divorce judgment in Case No. D-11260, and recognized it for what it was, i.e., as an interlocutory, ex parte, default judgment; then the court examined the finding in that case, that respondent was a resident of California on August 24, 1953, when personally served in Idaho with summons issued out of the California court and cause; also it considered the recital that respondent appeared in said action.

Again, appellant neither pleaded nor proved any California law in support of his assertion that respondent was a domiciliary of California at said time.

The trial court found upon the undisputed evidence that respondent had conformed to Idaho's residence requirement before bringing her divorce action, i.e., that she established her residence in this state on or before July 10, 1953, and had been such a resident six full weeks preceding her commencement of her action August 22, 1953, on which date she filed her complaint.

The trial court also ruled, again in conformity with undisputed evidence, that at the time it granted respondent her absolute divorce August 31, 1954, she then was and at all times since July 10, 1953, had been a resident of and domiciled in this state. Respondent's intention to abandon her old residence and establish a new one in Idaho was corroborated by two witnesses. Respondent by undisputed evidence proved her domicile and residence and that of her children in Idaho and the court properly found thereon. I.C., secs. 32-701, 32-702, and 32-703; Robinson vs. Robinson, 70 Idaho 122, 212 P. 2d 1031; Hampshire vs. Hampshire, 70 Idaho 522, 223 P. 2d 950.

The trial court further found that while substituted service was made on respondent in Idaho August 24, 1953, of summons issued out of the California court in appellant's divorce action, respondent did not appear or in any manner participate in said California action. The court on inquiry found that respondent wrote a letter to a judge of the California Superior Court stating that she had no funds to go to California in connection with the custody order to show cause, which letter was placed in the file of the California divorce action; that respondent did not verify

her letter, although appellant verified his complaint. That letter was stricken from the file of the California action, on motion made therein by appellant. Respondent did not pay any appearance fee, nor did she evince any intention to make an appearance in the case.

Respondent's letter did not constitute a personal appearance in appellant's California divorce action, and the trial court properly so held. Rutherford vs. Bentz (Ill.), 104 N.E. 2d 343; In re Kimball's Estate (N.Y.), 49 N.E. 331; Fortier vs. Gumelsky (La.), 87 So. 741.

Inasmuch as the substituted service of summons upon respondent in Idaho appears on the face of the judgment roll of the California case No. D-11260, appellant's assignment of error that the trial court permitted a collateral attack upon the judgment in said action is not well taken; for the California judgment shows on its face that it attempted to operate in personam as to custody of the children; whereas the findings in said action show that not only was respondent in Idaho at the time of service of summons upon her but also that the children were with her. Such judgment insofar as it attempts to operate in personam was and is void and subject to collateral attack since it was made and entered without the court having obtained jurisdiction of the person of respondent. An inspection of the judgment roll in said action, without further evidence, shows such portion of the judgment to be void for the reasons aforesaid. Weil vs. Defenbach, 36 Idaho 37, 208 P. 1025. See also Clemens vs. Kinsley, 72 Idaho 251, 239 P. 2d 266, wherein the non-

resident wife was served with summons in a foreign state; this court held that the trail court "never acquired jurisdiction to determine the custody of the child, the service being by substitution, and the defendant and the child being out of the state."

A divorce action is classified as an action in rem or quasi in rem since the marital status is the res. Gorges vs. Gorges, 42 Idaho 357, 245 P. 691. Substituted service does not warrant the rendition of a judgment in personam but merely authorizes proceedings in rem. Substituted service is ineffective to confer jurisdiction as to the personal rights and liabilities of the defendant. 49 C.J.S., 64 Judgments, sec. 24; 42 Am. Jur., pp. 62-64, secs. 73-75; Crouch vs. Crouch (Cal.), 169 P. 2d 897; State ex rel Miller vs. District Court (Mont.), 186 P. 2d 506; Indemnity Ins. Co. of N.A. vs. Smoot (App. D.C.), 152 F. 2d 667, 163 A.L.R. 498 Cert. denied 328 U.S. 835, 90 L. ed. 1611, 66 S. Ct. 981; Southern Mills vs. Armstrong (N.C.), 27 S.E. 2d 281, 148 A.L.R. 1248.

A judgment wholly or in part in personam may not be awarded against a nonresident not personally served within the court's jurisdiction and not voluntarily appearing. Jackson vs. Jackson (N.Y.), 49 N.E. 2d 988, 147 A.L.R. 668; Gulda vs. Second National Bank (Mass.), 80 N.E. 2d 12, 15 A.L.R. 2d 605; Bank of Edwardsville vs. Raffaelle (Ill.), 45 N.E. 2d 651, 144 A.L.R. 401; State ex rel Miller vs. District Court (Mont.), supra.

The rule is stated in 42 Am. Jur., sec. 75, p. 64, as follows:

> A personal judgment based on constructive or substituted service on a nonresident who does not appear or otherwise assent to such mode of service is contrary to due process of law, and is not valid either in the state where rendered or elsewhere. This doctrine applies to all kinds of constructive or substituted process, whether service by publication, or personal service out of the jurisdiction in which the judgment is rendered. Such a judgment is not required to be enforced in another state, either by the due faith and credit clause of the Constitution, or the act of Congress passed in aid thereof.

The trial court properly made inquiry into the jurisdiction of the California court in which the judgment was rendered, and into the facts necessary to give jurisdiction. The rule is stated in Mason vs. Pelkes, 57 Idaho 10 at 33, 59 P. 2d 1087, in the following language:

> Article 4, sec. 1 of the Constitution of the United States requires that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, but this provision does not preclude inquiry into the jurisdiction of the court in which the judgment was rendered, or into the facts necessary to give such jurisdiction; nor are the courts of a state required to give full faith and credit to a judgment rendered by a court of another

state which had no jurisdiction of the subject-matter or of the parties.

See also Treinies vs. Sunshine Mining Co., 308 U.S. 66, 84 L. ed. 85. Even record recitals of jurisdictional facts do not preclude oral testimony as to the circumstances of those facts. Brown vs. Fletcher's Estate, 210 U.S. 82, 52 L. ed. 966; Thompson vs. Whitman, 18 Wall. 457, 21 L. ed. 897; Knowles vs. Gas Light and Coke Company, 19 Wall 58, 22 L. ed. 70; Thum vs. Pyke, 8 Idaho 11, 66 P. 157.

Restraining Order

Respondent produced as one of her witnesses an attorney at law, admitted to practice and for many years a practitioner in the courts of the State of California. He testified concerning the California law applicable to the proceeding, Case No. 629775, wherein respondent made application for a commission and subpoenae to take depositions in that state for use in her Idaho divorce action; that such is a special statutory proceeding in which the court exercises no equity jurisdiction, nor any power beyond the scope of the application. "Special proceedings established by statute must strictly follow the statute, and a court sitting therein has no general or equitable jurisdiction." I Cal. Jur. 2d 635. The California court, after hearing respondent's said application, made a minute entry granting appellant's motion "to quash subpoenae and subpoenae duces tecum * * *, and plaintiff is re-

strained from taking depositions in this county to be used in the Idaho proceedings."

The trial court then found, in accordance with the aforesaid evidence, which was undisputed, that appellant, in spite of and in disregard of such minute entry, prepared and had signed an order, without notice and without findings or conclusions of law, and in such special proceeding, the additional injunctive order directed against respondent restraining her from proceeding further in her Idaho divorce action, contrary to the California law, Cal. Code Civ. Procedure, secs. 632 and 634; Rule 19, Superior Courts of California; Kaliterna vs. Wright (Cal.), 94 C.A. 2d 926, 212 P. 2d 32. The trial court then further found that at the time appellant obtained the California interlocutory judgment and at the time he obtained the restraining order, upon which he relies, he well knew that the Idaho trial court August 26, 1953, had issued its injunctive order (served upon appellant September 14, 1953), restraining him from molesting respondent or interfering with her custody and care of the minor children, and that he well knew said children were in respondent's care in the State of Idaho. The restraining order, being not responsive to, nor within the issues of, such special proceeding, was not entitled to full faith and credit and therefore was and is a nullity; the trial court properly so ruled and decreed.

A judgment of a sister state which upon inquiry is found to include an abuse of process or a flagrant departure from ordinary judicial procedure is not en-

titled to full faith and credit. Andrews vs. Andrews, 188 U.S. 14, 47 L. ed. 366.

Appellant's assignment that the trial court erred in refusing to stay the Idaho proceedings pending disposition of an appeal from said restraining order in the California case, No. 629775, is not well taken. Appellant's motion to stay the proceedings went to the sound discretion of the trial court. No abuse of that discretion appears, particularly in view of the invalidity of such restraining order. Graves vs. Backus (Minn.), 72 N.W. 811; Prudential Ins. Co. vs. Zimmerer (D.C. Neb.), 66 F. Supp. 492.

The record shows that the trial court had jurisdiction of an automobile belonging to the parties; therefore, the court properly decreed and disposed of the community interests of the parties therein.

We deem it unnecessary to consider appellant's further assignments of error.

The judgment of the trial court is affirmed. Costs to respondent.

TAYLOR, C. J., and KEETON, PORTER and ANDERSON, JJ., concur.

Appendix C

ROBERT M. NEWELL,

Plaintiff,

vs.

THE HONORABLE D. H. SUTPHEN, AS JUDGE OF THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING, AND THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING,

Defendants.

No. 8231.

Supreme Court of Idaho

Jan. 19, 1955.

PORTER, Justice.

On August 31, 1954, a divorce action entitled Gertrude B. Newell, plaintiff, vs. Robert M. Newell, defendant, was pending in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding. On such date defendant district judge made and entered a certain order of contempt in such action wherein Robert M. Newell, plaintiff herein, was adjudged guilty of contempt of court by reason of the sale of a certain station wagon automobile. Thereupon, plaintiff initiated this proceeding in this court asking for a Writ of Prohibition and or Writ of Certiorari for the purpose of testing the validity of such contempt order and staying further action in such contempt matter pending the final determination of this proceeding.

By a separate petition, plaintiff asked for an order staying the contempt matter until this court could determine whether the Writ of Prohibition and/or Writ of Certiorari should issue. This court thereupon granted such stay order.

Thereafter, this court issued a Writ of Review requiring defendants to submit a full and true copy of the record of such contempt proceedings to this court for review, and requiring such district judge to desist from further action in said contempt matter until further order of this court.

Thereupon, Gertrude B. Newell, the real party in interest, filed an application for attorney's fees and costs in this proceeding and for a stay of further proceedings under the Writ of Review pending the payment of same and pending the payment of costs, attorney's fees and support money for three children allowed by the trial court in the divorce action.

Defendants filed a motion to modify and clarify the restraining order contained in the Writ of Review to permit the trial court to proceed with the hearing upon an order to show cause why Robert M. Newell should not be held in contempt for failure to pay said support money for three children and to permit the court to hear the motion for new trial.

Defendants also filed a motion praying that this court reconsider and rehear the matter of the issuance of the Writ of Review and stay further proceedings thereon pending a hearing on such motion; and that plaintiff be required to prepay or secure the cost of compliance with the Writ of Review in the

event any record of the proceedings in the divorce action be required. Defendants and Gertrude B. Newell also filed a motion to strike the application for and to recall the Writ of Review upon the ground that the contempt order was not a final order.

After consideration of such motions, this court issued an order staying the further execution of the Writ of Review pending the further order of this court, granted the motion to reconsider the issuance of the Writ of Review and granted leave to plaintiff to answer and respond to the application of Gertrude B. Newell and the motions of defendants. The restraining order contained in the Writ of Review was continued in effect pending further order of the court.

Plaintiff filed his answer and response to the application of Gertrude B. Newell and to the motions of defendants and accompanied the same by the affidavit of plaintiff, Robert M. Newell. Defendants moved to strike such affidavit on the ground that same is not a responsive answer to the pleadings of defendants and Gertrude B. Newell.

At the request of the parties, this court set the entire matter for hearing upon oral argument. Prior to such hearing a motion was ganted to augment the record by adding the "Notice of Appeal" by Robert M. Newell in the divorce case from the judgment of the district court to this court. The cause has been presented upon oral argument and is now before us for determination.

From the record the following pertinent facts appear:

Robert M. Newell and Gertrude B. Newell were married on November 1, 1942. On August 17, 1953, plaintiff filed an action for divorce against Gertrude B. Newell in the Superior Court of the State of California in and for the County of Los Angeles. Gertrude B. Newell was served with process in the State of Idaho but did not personally appear in such action. On September 28, 1953, said Superior Court of Los Angeles County granted plaintiff an interlocutory decree of divorce, including therein the division of the community property of the parties.

On August 27, 1953, Gertrude B. Newell filed an action for divorce in the District Court in Gooding County, Idaho. Robert M. Newell made a general appearance in the Idaho action. On January 19, 1954, upon the request and motion of Robert M. Newell, defendant in such action, the court made an order awarding to such defendant the use of a 1953 Buick Station Wagon automobile pending the final determination of the ownership thereof in such divorce action. On April 26, 1954, J. L. Eberle, attorney for plaintiff, Gertrude B. Newell, in such divorce action, filed an affidavit in support of an application for an order to show cause why defendant in such action should not be adjudged guilty of contempt of court on the ground that he had sold and disposed of such station wagon.

On June 11, 1954, Gertrude B. Newell commenced an action in the Superior Court of the State of California in and for the County of Los Angeles entitled Gertrude B. Newell vs. Robert M. Newell by which she sought to procure the issuance of subpoenae re deposi-

tion and subpoenae duces tecum to obtain evidence for use in the trial of the Idaho action. After hearing, on motion of Robert M. Newell, such court issued an order to quash such supoenae on June 22, 1954. No appeal was taken from such order and the time to appeal has not expired.

On June 23, 1954, after hearing on order to show cause, the said Los Angeles County Superior Court filed a restraining order and injunction restraining Gertrude B. Newell and the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Gooding from proceeding further with the divorce action in such court. On July 9, 1954, Gertrude B. Newell filed an appeal from the order dated June 23, 1954, which appeal is presently pending in the District Court of Appeals of the State of California.

On July 12, 1954, hearing was had in the District Court in Gooding County on the order to show cause in the contempt proceeding. Thereafter, on August 31, 1954, Judge D. H. Sutphen, defendant herein, entered an order of contempt, finding Robert M. Newell, defendant in such action, guilty of contempt of court for the sale and transfer of the said Buick Station Wagon automobile contrary to the order of the court dated January 19, 1954. The court concluded such order of contempt in the following language:

> Now Therefore, It Is Hereby Ordered That said defendant Robert M. Newell, be and hereby is adjudged guilty of contempt of this Court; and

It Is Further Ordered That said Defendant may purge himself of said contempt if, within thirty (30) days from the date of this order, said Defendant either returns said Station Wagon to the custody of this court, or pays to Plaintiff the sum of $825.00; and

It Is Further Ordered That if said car is not returned or if said payment be not so made, said Defendant shall appear before this Court on the 31st day following the date of this order, or at such other time as the Court may fix, for sentence and pronouncement of judgement for such contempt.

On August 31, 1954, the trial court granted a decree of divorce to Gertrude B. Newell and awarded her the Buick Station Wagon or the value thereof. From such judgment, it now appears, Robert M. Newell has duly appealed to this court, where such appeal is now pending.

It is the main contention of plaintiff herein that in view of the proceedings in the California Courts, defendant judge and defendant district court were without jurisdiction to hear and determine the divorce action filed in such district court or to adjudge defendant therein guilty of contempt for violation of any alleged order issued by the court in such action.

It is now apparent that in order to pass upon the validity of the contempt proceedings and to determine the jurisdiction or lack of jurisdiction of the trial court, it will be necessary for the entire proceedings in the

divorce action to be before this court. Orderly procedure, lessened expense, prevention of duplication and the best interests of the litigants would seem to dictate that the matters involved be not heard piece-meal, but that the whole matter be considered upon the appeal from the judgment with the entire transcript before us.

It appears that the primary purpose of this proceeding is to prevent execution upon any judgment for fine or imprisonment which may be entered by the trial court in the contempt proceedings prior to a final determination on the merits of the question of jurisdiction. It further appears from the oral argument that defendants herein and Gertrude B. Newell, the real party in interest, have no objection to such a stay of execution. It is evident that the contempt proceedings and any judgment entered therein must eventually stand or fall dependent upon the final determination of the question of jurisdiction of the trial court. Williams vs. Koelsch, 67 Idaho 341, 180 P. 2d 237; MacWatters vs. Stockslager, 29 Idaho 803, 162 P. 671; Hay vs. Hay, 40 Idaho 159, 232 P. 895.

In view of the foregoing judgment will be entered as follows: The Writ of Review heretofore issued will be quashed. Defendants will be restrained and enjoined from carrying out the execution of any judgment of fine or imprisonment which may be hereafter entered in the pending contempt proceedings relative to the Buick Station Wagon or other proceedings in such connection. Such restraining order will not prohibit the trial court in proceeding to judgment in the pending

contempt proceedings or other contempt proceedings in the divorce action.

The application of Gertrude B. Newell for an order granting her attorney's fees for services of counsel in this original proceeding will be denied. Orders for attorney's fees in connection with divorce actions are made by this court only where necessary or proper in aid of the complete exercise of its appellate jurisdiction. Callahan vs. Dunn, 20 Idaho 225, 164 P. 356; Vollmer vs. Vollmer, 43 Idaho 395, 253 P. 622; McDonald vs. McDonald, 55 Idaho 102, 39 P. 2d 293; Cole vs. Cole, 68 Idaho 257, 193 P. 2d 395; Bedwell vs. Bedwell, 68 Idaho 405, 195 P. 2d 1001.

Support and maintenance of the minor children of the parties to the divorce action and costs and attorney's fees allowed by the trial court in such action are not proper issues before this court in this proceeding, and will not be considered.

Let judgment be entered accordingly. No costs allowed.

TAYLOR, C. J., and KEETON and SMITH JJ., concur.

GIVENS, J., sat at the hearing prior to his retirement but did not participate in the decision.

Appendix D

GERTRUDE B. NEWELL,
Plaintiff and Appellant,

vs.

ROBERT M. NEWELL,
Defendant and Respondent.

Civ. 20574.

District Court of Appeal, Second District
Division 2, California
Nov. 2, 1955
Rehearing Denied Nov. 22, 1955
Rehearing Granted Dec. 28, 1955.

McCOMB, Justice.

On June 11, 1954, plaintiff applied to the Los Angeles Superior Court for the issuance of a subpoena to take the depositions of certain witnesses residing in Los Angeles County for use in a divorce action then pending in Idaho. Pursuant to the provisions of the Code of Civil Procedure, Section 2037, a supoena was issued by the trial court. Thereafter defendant moved to quash and set aside such subpoena and obtained an order to show cause why plaintiff should not be restrained from taking the depositions or from taking any further proceedings in her Idaho divorce action, other than to dismiss it with prejudice. The motion and order to show cause were based on the fact that the evidence was immaterial since defendant on September 28, 1953, had obtained an interlocutory decree of divorce from plaintiff in Los Angeles County Su-

perior Court, which decree was valid and binding in all particulars, and was a complete and final determination of all the issues.

Plaintiff filed affidavits in opposition to the motion to quash and the order to show cause, and after a full hearing the trial court granted the motion to quash and enjoined plaintiff from proceeding with her Idaho action. The minute order of June 18, 1954, entered on June 22, 1954, reads thus: "The motion of defendant to quash subpoenae and subpoenae duces tecum is granted and plaintiff is restrained from taking depositions in this county to be used in the Idaho proceedings."

On June 22, 1954, the court signed a restraining order and injunction, which was filed on June 23, 1954, reading (omitting the title of the court and cause) as follows:

> The order to show cause re restraining order and injunction came on regularly for hearing on Friday, June 18, 1954, in Department 8 of the above entitled court before the Honorable Elmer D. Doyle, Judge presiding. Messrs. Ernest W. Pitney and William H. Brawner appearing as counsel for plaintiff and Theodore A. Chester, Esq. appearing as counsel for defendant.
>
> It appearing, among other things, that on September 28, 1953 the above entitled court made and entered an interlocutory decree of divorce between the parties hereto in that certain action entitled 'Robert M. Newell, plaintiff vs. Gertrude B. Newell, defendant,' Los Angeles County Supe-

rior Court case No. Pasadena D-11260; and it further appearing that the above named plaintiff made a general appearance in said California action and further that she was a resident of the State of California on August 17, 1953, the date on which said California action was filed, and on August 24, 1953, the date on which she was personally served with process in said California action, and that said California judgment is a complete and final determination of all of the issues before the Court in that certain action filed by the above named Plaintiff in the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Gooding, entitled 'Gertrude B. Newell, plaintiff vs. Robert M. Newell, defendant,' being case No. 6462, and that said California judgment is binding on said Gretrude B. Newell in all particulars;

It Is Ordered, Ajudged And Decreed:

That Gertrude B. Newell, the above named plaintiff, and Ernest W. Pitney and William H. Brawner, her attorneys, and any other attorney or attorneys now employed or hereafter employed by her, are hereby restrained and enjoined from:

(1) Taking the depositions of Mrs. Luis Odriozola, Mrs. Warren Wilson, Mr. and Mrs. Jay B. Latham, Mr. and Mrs. Grace P. Douglas, Mrs. Sarah Fletcher, Esther M. Sheets, the California Bank, a banking corporation, D. T. Hubbard, Personal Loan Supervisor of said bank, and Forrest Denning, Vice President of said bank, for use

by said plaintiff in that certain action entitled 'Gertrude B. Newell, plaintiff vs. Robert M. Newell, defendant,' heretofore filed by her in the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Gooding, being case No. 6462.

(2) Taking the depositions of any other witnesses for use in said Idaho action.

(3) Taking any further action or proceedings whatsoever in said Idaho action.

(4) Taking any steps whatsoever for divorce in any court in any state, or country, leading to the entry of a divorce between the parties hereto or a determination of the rights of custody of the minor children of the parties hereto, other than in the above entitled court, except to enter a dimissal with prejudice of said Idaho action.

Dated June 22, 1954.

On July 8, 1954, plaintiff appealed from the order of June 22, 1954, which was filed June 23, 1954. So far as material here, the notice of appeal reads:

You Will Please Take Notice that the plaintiff in the above entitled action is appealing to the Supreme Court of the State of California from that certain order made and entered in the above entitled action on the 23rd day of June, 1954, and from the whole thereof, and plaintiff hereby requests that a Clerk's Transcript and a Reporter's Transcript be prepared of the testimony offered

or taken, evidence offered or received, and all rulings, acts or statements of the Court, all objections or exceptions of counsel, and all matters to which the same relate, and hereby designates and specifies such of the pleadings, papers, records, files and exhibits in said cause, as she desires to have incorporated in the record on appeal * * *

Questions: First: *Did the trial court err in making its order on June 18, 1954, (entered June 22, 1954), granting defendant's motion to quash the subpoena and subpoena duces tecum, theretofore issued and restraining plaintiff from taking depositions in this state to be used in the Idaho divorce action?*

This question will not be considered by us for the reason that plaintiff has not appealed from this order of the trial court. It will be noted from reading the notice of appeal that the appeal is only "from that certain order made and entered in the above entitled action on the 23rd day of June, 1954, and from the whole thereof." The only thing done in the case on June 23, 1954 was to file the restraining order and injunction. No notice of appeal was filed from the order of June 18, 1954.

The notice of appeal must point out the particular judgment or order, or the specific part thereof, from which the appeal is taken (Rules on Appeal, 1 (a), 36 Cal. 2d 1; In re Estate of Robertson 114 Cal. App. 2d 267, 269 (4), 250 P. 2d 179.) Nor is there any merit in the contention that the words "from the whole thereof" appearing in the notice of appeal, are sufficient to bring

up for review the order from which an appeal was not taken. The words "from the whole thereof" in the notice of appeal relate to the order previously mentioned, to-wit, the order dated the 23rd day of June, 1954, and from the whole thereof, and not to any other order or judgment. (In re Estate of Bearns, 77 Cal. App. 2d 221, 223 (2), 175 P. 2d 283.)

In the absence of a proper notice of appeal being filed, this court is without jurisdiction to consider any alleged error in the order entered June 22, 1954. (People vs. Brown, 148 Cal. 743, 744 et seq., 84 P. 204; cf Robins vs. Weis, 97 Cal. App. 2d 144, 145, 217 P. 2d 156.)

Second: *Did the trial court err in restraining plaintiff from proceeding with her divorce action in the State of Idaho?*

No. A state can exercise through its courts jurisdiction to forbid a party, subject to its jurisdiction, from doing an act in another state. (Restatement of Conflict of Laws, (1934) section 96, p. 146; Smith vs. Davis, 90 Cal. 25, 32, 27, P. 26; Title Insurance & Trust Co. vs. California Development Co., 171 Cal. 173, 199 et seq., 152 P. 542.)

The record discloses that plaintiff and defendant were married in Pasadena, California in 1942, and resided in Los Angeles County all of their married life except for the times that defendant was stationed elsewhere during World War II or completing his education. On June 30, 1953, plaintiff, accompanied by the three children of the parties, her father and the family housekeeper left to visit relatives of plaintiff

in Montana. She stated it was her intention to remain in Montana for a few weeks and then with the children return to California in the middle of August, 1953. On July 16, 1953, in a telephone conversation with defendant she advised him that she had been unable to find satisfactory accommodations in Montana, but had found a place at McCall, Idaho. On August 13, 1953, she told defendant that she intended to get a divorce while in Idaho and he would not be permitted to visit with the children under any circumstances unless and until he settled their domestic difficulties on terms to be dictated by her. Upon being so advised, defendant filed shortly thereafter an action for divorce against plaintiff in the Los Angeles Superior Court, being known as Pasadena D-11260.

On August 15, 1953, plaintiff filed an action for divorce in the Fourth Judicial District in and for the County of Gooding, Idaho, against defendant herein. On September 25, 1953, the superior court of Los Angeles County enjoined plaintiff from proceeding with her Idaho divorce action. On September 28, 1953, the Los Angeles Superior Court granted defendant herein an interlocutory decree of divorce in the Pasadena action D-11260, in which it was found, among other things, that defendant (plaintiff herein) "has been a resident of the State of California, County of Los Angeles, for at least six years continuously prior to the filing of this action and was a resident of the State of California, County of Los Angeles, on August 17, 1953, the date this action was filed, and on August 24, 1953, the date defendant was personally served with a copy

of the summons and complaint in the State of Idaho."

It is therefore evident that the trial court had personal jurisdiction over plaintiff by virtue of her appearance in the divorce action and her residence in the State of California. Having personal jurisdiction over her, the California court made a complete disposition of the community property of the parties, awarded custody of the minor children to defendant and restrained plaintiff herein from proceeding with her divorce action in Idaho. Having determined the California interlocutory decree to be valid and binding upon plaintiff, the court, acting within its discretion, entered the injunction and restraining order now under consideration.

In view of the fact that plaintiff was continuing an action which would render the California divorce judgment ineffectual; would create a multiplicity of actions relating to the same subject matter; would cause defendant unnecessary expense and inconvenience, and in addition was threatening to perpetrate fraud upon the courts of the State of Idaho in representing to them that she was a bona fide resident of that state, the trial court acted properly in issuing the injunction.

Stout vs. Pate, 120 Cal. App. 2d 699, 261 P. 2d 788, 790, is not here in point. In such case the court held in an action for the support of a child that "* * * When a child is within California the courts are independent of all judgments of sister states to investigate and determine what are the best interests of the child. (Foster vs. Foster, 8 Cal. 2d 719, 726 (68 P. 2d 719).) And such order of a California court cannot be chal-

lenged upon the ground that a prior decree of another jurisdiction providing for the custody and support of the child was res judicata. There is no permanent finality to a custodial award."

The situation in the instant case is not analogous. In the case at bar plaintiff was not seeking a judgment for support of the children in Idaho. She was seeking a divorce, and as an ancillary matter sought to obtain custody of the children contrary to the terms of the California decree which she had flagrantly violated.

The order from which the appeal is taken is affirmed.

MOORE, P. J. and FOX, J., concur.

Appendix E

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

ROBERT M. NEWELL,
Plaintiff,

vs.

GERTRUDE B. NEWELL,
Defendant

No. PASA. D-11260

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on to be heard before the Honorable Kurtz Kauffman, Judge presiding in Department Pasadena "A", on the 25th day of September, 1953, W. I. Gilbert, Jr., Esq. appearing as attorney for plaintiff and it appearing that the defendant was duly served with process and has appeared but has not answered the complaint, and that the default of the defendant has been entered: and evidence having been introduced on the part of plaintiff and the court having considered the same and being fully advised in the premises, makes the following findings of fact:

FINDINGS OF FACT

I

The parties were married on November 1, 1942 in Pasadena, California, and separated on June 30, 1953.

II

There are three children of the marriage, namely, ROBERT M. NEWELL, JR., age 9½ years, CHRISTINE LINDSAY NEWELL, age 6 years, and WILLIAM CHARLES NEWELL, age 5 years.

III

Plaintiff has been a resident of the State of California, County of Los Angeles, for approximately six years continuously prior to the filing of this action.

IV

Defendant has been a resident of the State of California, County of Los Angeles, for at least six years continuously prior to the filing of this action and was a resident of the State of California, County of Los Angeles, on August 17, 1953, the date this action was filed, and on August 24, 1953, the date defendant was personally served with a copy of the summons and complaint in this action in the State of Idaho.

V

During the marriage of the parties hereto, the defendant has been guilty of extreme cruelty to the plaintiff in that she has wrongfully inflicted upon him grievous mental suffering without cause or justification and against his will and without his consent, all of which caused the plaintiff great and grievous mental suffering, pain and distress.

VI

For more than five years last past the children of the parties, ROBERT M. NEWELL, JR., CHRSITINE LINDSAY NEWELL and WILLIAM CHARLES NEWELL have been and now are residents of the County of Los Angeles, State of California.

VII

Plaintiff is a fit and proper person to have the custody, care and control of the minor children of the parties. Defendant is not a fit and proper person to have the custody, care and control of said minor children, because of her general attitude and conduct indicating a lack of interest or concern for the welfare of said children and because of said defendant's continued clandestine, illicit and adulterous conduct with another man in the presence of said children to their detriment and harm. It is for the best interests of the children that their care, custody and control be awarded permanently to plaintiff.

VIII

During the course of the marriage of the parties, they have accumulated community property consisting of the following:

(1) The house and lot situated at 1300 Virginia Road, in the City of San Marino, County of Los Angeles, State of California, more particularly described as:

(Description Omitted)

(2) All of the furniture and furnishings in the family home at 1300 Virginia Road, San Marino, California, including, but not limited to the following items:

(Listed Items Omitted)

(3) A one-half interest in that certain 1953 Buick Estate Wagon automobile bearing California 1953 License No. 1X27671.

IX

Plaintiff owns as his sole and separate property a one-half interest in that certain 1953 Buick Estate Wagon automobile bearing California 1953 License No. 1X27671. Defendant owns as her sole and separate property that certain 1951 Nash Rambler automobile.

X

At the present time the defendant is outside the State of California with the children of the parties and has refused, and still refuses, to return the children to the State of California, all against the wishes and consent of plaintiff.

CONCLUSIONS OF LAW

From the foregoing findings the court makes the following conclusions of law:

I

Plaintiff Robert M. Newell is entitled to a divorce from defendant on the grounds of extreme cruelty.

II

Plaintiff is entitled to the sole custody, care and control of the minor children of the parties, subject to the right of defendant to visit them at all reasonable times. The defendant should be ordered to deliver forthwith to plaintiff the care, custody and control of the minor children of the parties.

III

All of the community property of the parties hereto is awarded to plaintiff as his sole and separate property.

DATED: September 25, 1953.

KURTZ KAUFFMAN, JUDGE

No. PASA. D-11260

INTERLOCUTORY JUDGMENT OF DIVORCE
(Default)

The above entitled cause came on to be heard before the Honorable Kurtz Kauffman, Judge presiding in Department Pasadena "A" on the 25th day of September, 1953, W. I. Gilbert, Jr., Esq. appearing as attorney for plaintiff and it appearing that the defendant was duly served with process and has appeared but has not answered the complaint, and that the default of the defendant has been entered; and evidence having been introduced on the part of plaintiff, and the court having made and caused to be filed its written findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED AND DECREED, that:

I

Plaintiff Robert M. Newell is entitled to a divorce from defendant Gertrude B. Newell, and when one year shall have expired after entry of this interlocutory judgment a final judgment dissolving the marriage between plaintiff and defendant may be entered.

II

Plaintiff Robert M. Newell is hereby awarded the custody, care and control of the minor children of the parties, namely, ROBERT M. NEWELL, JR.,

CHRISTINE LINDSAY NEWELL and WILLIAM CHARLES NEWELL, subject to defendant's right of reasonable visitation at all reasonable times.

Defendant is hereby ordered to forthwith deliver said children to plaintiff's care, custody and control, and defendant is hereby restrained and enjoined from removing the minor children of the parties, or any of them, from the County of Los Angeles, State of California, without the prior written permission of the plaintiff or an order of this court.

III

The following property is awarded to plaintiff as his sole and separate property:

(1) The house and lot situated at 1300 Virginia Road, in the City of San Marino, County of Los Angeles, State of California, more particularly described as:

(Description omitted)

(2) All of the furniture and furnishing in the family home at 1300 Virginia Road, San Marino, California, including, but not limited to the following items:

(Listed Items Omitted)

(3) That certain 1953 Buick Estate Wagon automobile bearing California 1953 License No. 1X27671.

Let this decree be entered.

DONE IN OPEN COURT THIS 25th day of September, 1953.

KURTZ KAUFFMAN, JUDGE

Appendix F

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

No. 629775

RESTRAINING ORDER AND INJUNCTION

GERTRUDE B. NEWELL,

Plaintiff,

vs.

ROBERT M. NEWELL,

Defendant.

The order to show cause re restraining order and injunction came on regularly for hearing on Friday, June 18, 1954, in Department 8 of the above entitled court before the Honorable Elmer D. Doyle, Judge presiding, Messrs. Ernest W. Pitney and William H. Brawner appearing as counsel for plaintiff and Theodore A. Chester, Esq. appearing as counsel for defendant.

It appearing, among other things, that on September 28, 1953 the above entitled court made and entered an interlocutory decree of divorce between the parties hereto in that certain action entitled "Robert M. Newell, plaintiff vs. Gertrude B. Newell, defendant," Los Angeles County Superior Court case No. PASADENA D-11260; and it further appearing that the above named plaintiff made a general appearance in said California action and further that she was a resident of the State

of California on August 17, 1953, the date on which said California action was filed, and on August 24, 1953, the date on which she was personally served with process in said California action, and that said California judgment is a complete and final determination of all of the issues before the Court in that certain action filed by the above named plaintiff in the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Gooding, entitled "Gertrude B. Newell, plaintiff vs. Robert M. Newell, defendant," being case No. 6462, and that said California judgment is binding on said Gertrude B. Newell in all particulars;

IT IS ORDERED, ADJUDGED AND DECREED:

That Gertrude B. Newell, the above named plaintiff, and Ernest W. Pitney and William H. Brawner, her attorney's, and any other attorney or attorneys now employed or hereafter employed by her, are hereby restrained and enjoined from:

(1) Taking the depositions of Mrs. Luis Odriozola, Mrs. Warren Wilson, Mr. and Mrs. Jay B. Latham, Mr. and Mrs. Grace P. Douglas, Mrs. Sarah Fletcher, Esther M. Sheets, the California Bank, a banking corporation, D. T. Hubbard, Personal Loan Supervisor of said bank, and Forrest Denning, Vice President of said bank, for use by said plaintiff in that certain action entitled "Gertrude B. Newell, plaintiff vs. Robert M. Newell, defendant," heretofore filed by her in the District Court of the Fourth Judicial District of the State

of Idaho in and for the County of Gooding, being case No. 6462.

(2) Taking the depositions of any other witnesses for use in said Idaho action.

(3) Taking any further action or proceedings whatsoever in said Idaho action.

(4) Taking any steps whatsoever for divorce in any court in any state, or country, leading to the entry of a divorce between the parties hereto or a determination of the rights of custody of the minor children of the parties hereto, other than in the above entitled court, except to enter a dismissal with prejudice of said Idaho action.

DATED: June 22, 1954.

ELMER D. DOYLE
JUDGE OF THE SUPERIOR COURT

Appendix G

IN THE
DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF GOODING

GERTRUDE B. NEWELL,
Plaintiff,

vs.

ROBERT M. NEWELL,
Defendant.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled cause, by and through their respective counsel of record, as follows:

1. That Robert M., Christine Lindsay, and William Charles, the minor children of the parties hereto, are presently corporeally in the State of Idaho in the care of their mother, plaintiff herein, and said plaintiff now is and since, at least from the time of, the hearing before the above entitled court on defendant's motion for custody of said children on or about January 15, 1954, has been a fit and proper person to be awarded the custody and care of said children, if such a custody award can or may be made to her.

2. Defendant is a practicing attorney in California earning about $10,000.00 a year before income taxes.

3. Defendant denies the jurisdiction of the above entitled court to grant plaintiff any relief in this cause

upon the ground and for the reason that the Superior Court of the State of California, in and for the County of Los Angeles, in proceedings had in such court, to-wit, in the case of *Robert M. Newell, plaintiff, vs. Gertrude B. Newell, defendant*, No. Pasadena D-11260, and in the case of *Gertrude B. Newell, plaintiff, vs. Robert M. Newell, defendant*, No. 629775, entered an "Interlocutory Judgment of Divorce" and a "Restraining Order and Injunction," respectively, which Judgment and Order are final and conclusive, and entitled to full faith and credit, and are res adjuicata and are not subject to collateral attack herein. That certified copies of all proceedings in which said Judgment and Order were made are attached to this stipulation, and may be considered by the court for all purposes; as though pleaded and proved.

4. Plaintiff asserts that the above entitled court is not precluded by such California proceedings, and that the above entitled court, in any event, has jurisdiction to determine any or all of the issues involved in the above entitled cause.

5. Defendant, without waiver of any defense, will offer no proof as to his allegations contained in his answer and cross-complaint, excepting the proceedings in the California court as hereinbefore set forth.

6. Parties request that findings and conclusions include the following:

(a) Whether the decree and orders in the California proceedings are entitled to full faith and credit and are res adjudicata as to any or all of the issues in the above entitled cause.

(b) In the event such California proceedings are held to be res adjudicata of any or all of such issues, whether the above entitled court can grant plaintiff any relief as to the custody of said children; and if so, whether by way of modifiication of the California decree or by virtue of the inherent power of the above entitled court as a part of or separate from the divorce action.

DATED this 12th day of July, 1954.

RICHARDS, HAGA & EBERLE
Residing at Boise, Idaho
By J. L. EBERLE
Attorneys for Plaintiff

CARVER, McCLENAHAN & GREENFIELD
Residing at Boise, Idaho
By JOHN A. CARVER, JR.
Attorneys for Defendant

Appendix H

IN THE
DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF GOODING

GERTRUDE B. NEWELL,

Plaintiff,

vs.

ROBERT M. NEWELL,

Defendant.

DECREE

This cause came on regularly to be heard before the Court, without a jury, and on the merits on July 12, 1954, the defendant, Robert M. Newell being personally present in Court, and also represented by Counsel, John A. Carver, Jr., and plaintiff Gertrude B. Newell also being personally present and represented by counsel, J. L. Eberle and T. H. Eberle, and witnesses having been duly sworn and examined, and documentary proof offered, and the cause having been submitted for consideration and decision, and the Court having duly considered the same, and having duly filed its Findings of Fact and Conclusions of Law herein, and the Court being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the bonds of matrimony now and heretofore existing between the plaintiff and defendant be, and hereby are, forever dissolved and each of the parties is abso-

lutely freed from each, all and every of the obligations thereof;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff be, and hereby is, awarded the care, custody, education and control of Robert M. Newell, Christine Lindsay Newell and William Charles Newell, born as issue of the marriage; subject to reasonable rights of visitation of said children by said defendant, at such time or times and at such place or places as plaintiff may determine to be for the best interests and welfare of said children, but not oftener than once each month, upon giving plaintiff at least 24 hours notice in advance of any time said defendant desires to exercise such right of visitation;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the community property of the parties, consisting of a community interest in a 1953 Buick Station Wagon in the sum of $825.00 be, and hereby is, awarded to plaintiff as her sole and separate property, and the defendant be, and hereby is, directed to pay plaintiff, and plaintiff have and recover from defendant, the sum of $825.00;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that for the proper maintenace and support of the minor children said defendant be, and hereby is, directed to pay to plaintiff, and the plaintiff to have and recover from defendant, the sum of $675.00 payable on or before September 16, 1954; and that said

defendant be, and hereby is, directed to pay an additional amount to plaintiff, and plaintiff do have and recover from defendant, the sum of $75.00 per month for each of said children, during minority or until further order of this Court, on or before the 1st day of each and every month, commencing October 1, 1954;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that for counsel fees incurred by plaintiff, the defendant be, and hereby is, directed to pay to plaintiff, and plaintiff do have and recover from defendant, the sum of $500.00;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as special costs, defendant be, and hereby is, directed to pay to plaintiff, and plaintiff do have and recover from defendant, the sum of $43.65, in addition to statutory costs taxed in accordance with such memorandum of costs as plaintiff may be entitled to herein;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court has considered and recognized the interlocutory decree of divorce made and entered in the Superior Court of the State of California in and for the County of Los Angeles, Pasa-D-11260 on or about September 25, 1953, between the parties hereto and that the same be, and hereby is, declared and decreed to be interlocutory, ex parte or default, not final and on substituted service and is not res adjudicata or entitled to full faith and credit;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court has considered and recognized the restraining order in the special proceeding in said California Court, No. 629775, and the same be, and hereby is, declared and decreed to be not final and to have been issued without jurisdiction, not responsive to or within the special proceeding involved, not res adjudicata, not entitled to full faith and credit, and is a nullity;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that to protect the physical and economic well being of plaintiff and the minor children, defendant be, and hereby is, restrained from molesting or interfering with said plaintiff and minor children;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is still pending the matter of the contempt of the defendant herein, his purging himself of such contempt and the punishment in the event of his failure so to do and to have jurisdiction for such purpose, the same be, and hereby is, reserved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in addition to special costs above set forth, plaintiff have and recover from defendant herein her costs taxes herein at $ _____.

Dated August 31, 1954.

D. H. SUTPHEN, District Judge

Appendix I

IN THE SUPREME COURT OF THE STATE OF IDAHO

GERTRUDE B. NEWELL,
Plaintiff and Respondent,

vs.

ROBERT M. NEWELL,
Defendant and Appellant.

No. 8289

MOTION FOR CONSIDERATION OF EVIDENCE DEHORS THE RECORD

TO THE HONORABLE, THE SUPREME COURT OF THE STATE OF IDAHO:

COMES NOW appellant above named, by and through his attorneys of record, and respectfully submits evidence dehors the record which affects the proceedings on appeal, to-wit, the invocation by respondent of the jurisdiction of the Superior Court of the State of California in and for the County of Los Angeles, in Cause No. D-11260, entitled Robert M. Newell Plaintiff, vs. Gertrude B. Newell, Defendant, such being the cause which she urged at the trial to be invalid by reason of the absence of jurisdiction of the said court, and the decree of which court was held to be without force or effect by the lower court in this state. On February 17, 1955, the aid of the court granting the original California Decree was invoked by respondent as appears in respondent's affidavit supporting an

order to show cause, which said affidavit and order are as follows:

GLEN A. LANE, Attorney for Defendant, 639 South Spring Street, Los Angeles 14, California, Address. Telephone: VA 1336.

(Filed FEB. 17, 1955. HAROLD J. OSTLY, County Clerk, By C. Kingsley, Deputy)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

ROBERT M. NEWELL,

Plaintiff,

vs.

GERTRUDE B. NEWELL,

Defendant.

No. D PASA. D-11260

ORDER TO SHOW CAUSE AND AFFIDAVIT IN RE MODIFICATION OF ORDER FOR CUSTODY AND SUPPORT OF MINOR CHILDREN: AND ORDER TO SHOW CAUSE RE ATTORNEYS' FEES AND COSTS

To the above named Robert M. Newell.

You are hereby ordered to appear before the above-entitled Court in Department Pasa. "B" thereof on the 7th day of March, 1955, at the hour of M., then and there to show cause, if any you have, why that certain Order, made by

said Court on the 25th day of September, 1953, and more particularly described in the affidavit of for this Order to show cause in Re Modification thereof, and a copy of which affidavit shall be served upon you attached to a copy of this Order, should not be modified and further, different or additional Orders made, as requested in said affidavit.

Dated Feb. 17, 1955.

KURTZ KAUFFMAN,
Judge of the Superior Court

MODIFICATION QUESTIONNAIRE

Attorneys are requested to use this form as the Affidavit for Order to Show Cause in all applications for modification of Decrees or Orders for alimony, custody, and/or support of children.

STATE OF CALIFORNIA, County of Los Angeles, ss

AFFIDAVIT FOR ORDER TO SHOW CAUSE IN RE MODIFICATION OF Order for Custody and Support of Minor Children; and Order to Show Cause re Attorneys' Fees and Costs

Gertrude B. Ralphs being duly sworn, deposes and says:

(1) That on *September 25, 1953*, the above entitled court, Hon. *Kurtz Kauffman*, Judge presiding, made an order, ordering, among other things, the following:

That the custody of Robert M. Newell, Jr., Christine Lindsay Newell and William Charles Newell be awarded to the plaintiff, Robert M. Newell, subject to defendant's right of reasonable visitation at all times.

That affiant is the same person as Gertrude B. Newell, named above.

(2) That since said Order was made the conditions and circumstances surrounding the parties, and upon which said Order was based, have materially changed, in this: (here set forth the changes in circumstances and conditions occurring since the prior Order which you claim justify a modification thereof; it is res adjudicata as to matters passed on at that time).

That in the case No. 6462, in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, entitled 'Gertrude B. Newell, plaintiff vs. Robert M. Newell, defendant,' the court heard evidence by the parties hereto in a contested case, with said children before the Court, and made its order changing, modifying and annulling the order of the California Court for custody and awarding custody to the mother, Gertrude B. Newell. Robert M. Newell, plaintiff herein, stipulated that the mother was a fit and proper person to have the custody of said children.

That affiant has remarried and is residing with her husband, Walter Ralph, Jr., at 366 So. Hudson, Los Angeles, California.

(3) I have fully complied with the above-mentioned Order and am not in default thereunder, excepting only as follows:

No exceptions.

(4) Based upon the foregoing facts I hereby declare that it will be fair, equitable and reasonable to, and I request the court to modify the above-mentioned Order and make further, different or additional Orders, as follows, to-wit:

Awarding care, custody and control of minor children to affiant, mother of said children, subject to plaintiff's right of reasonable visitation; and

Ordering the plaintiff to pay a reasonable sum for the support and maintenance of said children, and a reasonable sum for defendant's attorney's fees and costs of suit herein.

(5) I have read the following questions and make answer as follows:

(a) Has the case been tried? *Yes.* (b) If not, when will it be ready for trial? (If already set, state date and Dept. No.) (c) Was the Order sought to be modified based in whole or in part upon the report of an Investigator or Referee? *No.* (d) What time do you estimate will be required for hearing? *Three (3) days.*

GERTRUDE B. RALPHS
Signature

Subscribed and sworn to before me on February 14, 1955.

Glen A. Lane, Notary Public, Los Angeles County, California.

(SEAL)

HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By..... Deputy.

Attention of the court is respectfully invited to the clause set forth in the parenthesis at the beginning of Paragraph 2 above, wherein it is recited that "it (the original order) is res adjudicata as to matters passed on at that time," as a judicial admission of such fact.

A certified copy of the foregoing affidavit and order and of an order based upon the show cause proceedings therein (copies of which are not presently available to counsel) are in process of being prepared by the clerk of the court issuing the same, and will be submitted to the court duly authenticated as soon as received.

The decree having been modified, plaintiff therein, appellant herein, appealed the order to the Supreme Court of California, and this fact also will be substantiated with authenticated copy of the Notice of Appeal.

This information is being submitted to the court in the conviction that this is a matter material for consideration by the court although outside the record.

as to which a duty exists to apprise the court. Authority relied upon is as follows:

Ehrman vs. Astoria & P. Ry. Co. (Oreg. 1894) 38 Pac. 306;
Sewell vs. Johnson (Calif. 1913) 134 Pac. 704;
Bellingham American Pub. Co. vs. Bellingham Pub Co. (Wash. 1927) 258 Pac. 836

Appellant's brief makes certain references to the existence of this California proceeding and it is respectfully requested that if such reference is improper, the court consider the brief as if no such references had been made.

Respectfully submitted:

CARVER, MCCLENAHAN & GREENFIELD
Residing at Boise, Idaho

By: John A. Carver, Jr.
Attorneys for Appellant.

Appendix J

IN THE

SUPREME COURT OF THE STATE OF IDAHO

GERTRUDE B. NEWELL, *Plaintiff and Respondent,* vs. ROBERT M. NEWELL, *Defendant and Appellant.*	No. 8289

MOTION TO VACATE HEARING ON MERITS

COMES NOW the appellant, by and through his attorneys of record, and moves this court to vacate its order setting the above matter for hearing on the merits on November 15, 1955, and in support of said motion respectfully shows that on the 2nd day of November, 1955, The District Court of Appeal of the State of California filed its opinion affirming the order of the Los Angeles County Superior Court in Case No. 629775 (Exhibit D of Transcript) restraining the respondent in this case from taking any further proceedings in this action other than to dismiss it with prejudice. An authenticated copy of said opinion is attached to this motion.

The injunctive order having been affirmed, it is submitted that this Court, in the exercise of its sound discretion, should vacate the hearing on the merits, pending appropriate action on Respondent's part to dismiss her proceedings in the District Court for the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, in pursuance of such in-

junctive order. If Respondent complies with the affirmed order of the California Court, the controversy will be terminated.

POINTS AND AUTHORITIES

I

A state can exercise through its courts jurisdiction to forbid a party, who is subject to its jurisdiction, to do an act in another state.

Restatement, Conflict of Laws, Sec. 96;
28 Am. Jur. 389 (Injunctions, Sec. 204);
Usen vs. Usen, 13 Atl. (2d) 738, 128 A.L.R. 1449.

II

Courts in the exercise of sound discretion will recognize injunctive orders of courts of sister states.

43 C.J.S. 503 (Injunctions, Sec. 50);
14 Cal. Jur. 194 (Injunctions, Sec. 15);
Engels vs. Lubeck, 4 California 31.

III

This Court will not consider moot questions.

Terhaar vs. Joint Class A School District No. 241, No. 8240, filed October 6, 1955.

Respectfully submitted:

CARVER, MCCLENAHAN & GREENFIELD
Residing at Boise, Idaho
By: John A. Carver, Jr.
Attorneys for Defendant and Appellant.

Service of the within and foregoing Motion to Vacate Hearing on Merits by receipt of a copy thereof is hereby acknowledged this ..... day of November, 1955.

RICHARDS, HAGA & EBERLE,
Residing at Boise, Idaho

By _____
Attorneys for Plaintiff and Respondent.

(THE OPINION ATTACHED IS PRINTED AS APPENDIX D)

Appendix K

California Code of Civil Procedure, Section 417:

"Jurisdiction to render personal judgment against person served out of state.

"Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service."

Idaho Code, Section 32-701:

"Residence required by plaintiff.—A divorce must not be granted unless the plaintiff has been a resident of the state for six full weeks next preceding the commencement of the action."

FILED
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JOHN T. FEY, C

No. 281

In the Supreme Court of the United States

OCTOBER TERM, 1956

ROBERT M. NEWELL,
Petitioner,

vs.

GERTRUDE B. NEWELL,
Respondent

ROBERT M. NEWELL,
Petitioner,

vs.

THE HONORABLE D. H. SUTPHEN, as Judge of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, and THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING,
Respondents

Brief in Opposition to Petition for Writs of Certiorari to the Supreme Court of the State of Idaho

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CITATIONS

CASES

	Page
Adam vs. Saenger, 303 U.S. 59-68, 82 L.ed. 649, 654	4
Andrews vs. Andrews, 188 U.S. 14, 47 L.ed. 366	9
Ex parte Brown, 203 P. (2d) 799, 90 C A. (2d) 65	21
Brown vs. Fletcher's Estate, 52 L.ed. 966, at 970	6
California Bank vs. Traeger, 10 P. (2d) 51, 215 Cal. 351	11
Carleton vs. Bickford, 13 Gray (Mass.) 591	6
Cole vs. Cole, 68 Idaho 561, 201 P. (2d) 98	3, 18
Cummings vs. Lowe, 52 Idaho 1, 10 P. (2d) 1059	3, 4
Dargie's Estate, 162 Cal. 51, 121 P. 320	13
Douglas vs. Douglas, 22 Idaho, 336, 343, 125 P. 796	3, 5
Estin vs. Estin, 334 U.S. 541, 92 L.ed. 1561	20
Fortier vs. Gumelsky, 87 So. 741, 150 La. 203, 1921	8
Hock vs. Bryan, 230 N.W. 823 (Minn.)	26
Iowa-Wire Bridge Co. vs. Phoenix Finance Corp, 25 A. (2d) 383 (Del.) Cert. Denied, 317 U.S. 671, 87 L.ed. 539	26
Kaliterna vs. Wright, 212 P. (2d) 32, 36	25
Kimball's Estate, 49 N.E. 331, 155 N.Y. 62	3
Kleinschmidt vs. Scribner, 54 Idaho 185, 189, 30 P. (2d) 362	5
Knowles vs. Gaslight Co., 19 Wall., 59 (86 U.S., XXII, 71)	6
Leupe vs. Leupe, 21 Cal. (2d) 145, 130 P. (2d) 697	13
Maloney vs. Mass. Bonding, 123 P. (2d) 449, 20 C. (2d) 1	11
Maloney vs. Winston Bros. Co., 18 Idaho 740, 757, 762, 111 P. 1080, 47 L.R.A. (N.S.) 634	3, 5
May vs. Anderson, 345 U.S. 528, 97 L.ed. 1221	19
Mechanics and M. Nat. Bank vs. Pingree, 40 Idaho 118, 129, 232 P. 5	3, 5
Moore vs. Pooley, 17 Idaho 57, 104 P. 898	4

Page

Moss vs. Vest, 74 Idaho 328, 262 P. (2d) 116 (1953) 17

Nealis vs. Carlson, 219 P. (2d) 56, 98 C. A. (2d) 65 23

Newell vs. Newell, 293 P. (2d) 663, 668 7

Norwood vs. Cobb, 24 Tex., 551 6

Noyes vs. Butler, 6 Barb., 613 6

Pessara vs. Pessara, 183 P. (2d) 279, 80 C. A. (2d) 965 24

Radermacher vs. Radermacher, 61 Idaho 261, 100 P.(2d) 955 5

Roth vs. Roth, 104 Ill. 35, 44 Am. M. 81 9

Rutherford vs. Bentz, 104 N.E. (2d) 243 (Ill. 1952) 7

St. Johns vs. Putnam, 220 N.Y.S., 141, 128 Misc. 714 26

Seiler's Estate, 164 Cal. 181, 128 P. 334, Ann. Cas. 1914B, 1093 13

Starbuck vs. Murray, 5 Wend., 148, per Marcy, J. 6

STATE vs. Martinez, 43 Idaho, 180, 192, 250 P. 239 3, 5

Sumway vs. Stillman, 6 Wend., 453 6

Treinies vs. Sunshine Min. Co., 308 U.S. 66, 84 L.ed. 85 3

Thompson vs. Whitman, 18 Wall., 463 (85 U.S., XXI, 897) 6

Williams vs. N. Carolina, 317 U.S. 287-324, 87 L.ed., p. 279 13

Wilson vs. Kryger, 242 U.S. 171, 61 L.ed. 299 4

STATUTES

Idaho Code, Sections 9-304, 9-307 and 9-308 (Appendix B) 43, 44

Idaho Code, Section 9-101 (Appendix B) 43

Idaho Code, Section 13-201 (Appendix C) 45

Idaho Code, Section 32-601 (Appendix J) 67

MISCELLANEOUS

2 Freeman on Judgments, 5th Ed., Sec. 629, p. 1326 11

9 Cal. Jur. 13, p. 786 21

15 Cal. Jur. Sec. 143, p. 57 11

Page

1 Cal. Jur. 2d, p. 635 23

7 Cal. Jur. 10 Yr. Supp. p. 359 11

APPENDICES

Appendix A 28

Appendix B 43

Appendix C 45

Appendix D 46

Appendix E 51

Appendix F 55

Appendix G 60

Appendix H 63

Appendix I 66

Appendix J 67

In the Supreme Court of the United States

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ROBERT M. NEWELL,
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THE HONORABLE D. H. SUTPHEN, as Judge of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, and THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING,
Respondents

Brief in Opposition to Petition for Writs of Certiorari to the Supreme Court of the State of Idaho

The Petition is premised upon the contention that the Idaho courts failed to give full faith and credit to an interlocutory divorce decree rendered in California (No. PASA. D-11260, hereinafter referred to as California Interlocutory Decree), and a restraining order issued by a different one of the eighty odd judges of the same court (No. 629,775, hereinafter referred to as

California Restraining Order). Said contention is without merit. The Idaho courts considered and recognized such decree as an interlocutory ex parte default decree and such restraining order for what it was under the applicable law; and petitioner submitted to and invoked the jurisdiction of the Idaho courts, sought relief for divorce, community property and custody of children and personally litigated in the Idaho courts all issues involved.

CALIFORNIA INTERLOCUTORY DECREE

(a) Incidence of Marital Status.

(1) Petitioner concedes, as he did in the Idaho courts, unless the decree is a final judgment, his petition must fail.

(2) The decree, upon its face, is not final. It specifically provides that petitioner is entitled to a divorce and that "when one year shall have expired after the entry of this interlocutory judgment a final judgment dissolving the marriage between plaintiff and defendant may be entered." (Pet. Appendix E, Page 83)

(3) Under the law applicable, the decree was not final. The Idaho courts considered and recognized the decree for what it was under such law. (Appendix A, Paragraph XI, Page 32). Section 9-101, Idaho Code, excludes foreign law as a fact to be judicially noticed. Sections 9-304, 9-307 and 9-308, Idaho Code, specifically provide for the method of proving foreign law. Appendix B, p. 43) In the absence of pleading and proof as to the laws of a sister state, it is assumed by the

Idaho courts that the same law prevails in the foreign state as prevails in Idaho. *Mason v. Pelkes*, 57 Idaho 10, 59 P. (2d) 1087, *Cole v. Cole*, 68 Idaho 561, 201 P. (2d) 98. In *Cummings v. Lowe*, 52 Idaho 1, 10 P. (2d) 1059, the Idaho court held:

> "There being no pleading or proof as to the laws of the State of Wisconsin where . . . estate was probated, as to transfer of choses in action by executors or administrators, we are bound to assume that the law of Wisconsin is the same as the law in Idaho concerning such transfers."[1]

(4) The Idaho courts had the right to apply law of Idaho in the absence of proper pleading and proof as to any different law in California; this is true even where a foreign law was stipulated.[2] Upon review, the

1—Section 9-101, Idaho Code, footnote.

"It has long been the rule in Idaho that its courts do not take judicial notice of the laws of another state, and that without allegation and evidence, it will be assumed the laws are the same as those of Idaho, and this is true even in a case where parties have stipulated that the courts might take judicial notice of the laws of another jurisdiction. Treinies v. Sunshine Min. Co., 308 U. S. 66, 84 L. Ed. 85, 60 Sup. Ct. 44, reh. den. 309 U. S. 693, 84 L. ed. 1034, 60.

2—Treinies v. Sunshine Min. Co., 308 U.S. 66, 84 L. Ed. 85. 92.

"It has long been the rule in Idaho that its courts do not take judicial notice of the laws of another state and that without allegation and evidence it will be assumed the laws are the same as those of Idaho. *Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 575, 762, 111 P. 1080 47 L.R.A. (N.S.) 634; *Douglas v. Douglas*, 22 Idaho, 336, 343 125 P. 796; *Mechanics and M. Nat. Bank v. Pingree*, 40 Idaho, 118, 129, 232 P. 5; *State v. Martinez*, 43 Idaho, 180, 192, 250 P. 239; *Kleinschmidt*

court is restricted to the record as to the applicable law. *Adam v. Saenger*, 303 U. S. 59-68, 82 L. Ed. 649, 654.

(5) Although briefs of parties are not properly a part of the record on review, petitioner has included his briefs. (R. 577, 623) In the Idaho courts petitioner referred to these briefs as an exposition of the law of California and apparently such briefs are included by petitioner in the record for such purpose. They are not in compliance with the statutory provisions for proving foreign law, supra. *Moore v. Pooley*, 17 Idaho 57, 104 P. 898. Such briefs were not evidence nor was the law of California pleaded and foreign law cannot even be shown by admission or stipulation. *Mason v. Pelkes*, supra. Even where the pleading set out the sister state's statute and the reply admitted the same read as alleged, such admission was not proof that such statute was the law of a sister state. *Wilson v. Kryger*, 242 U. S. 171, 61 L. Ed. 299. In any event, regardless of the nature of the proof it was incompetent in the absence of pleading. *Cummings v. Lowe*, 52 Idaho 1, 10 P. (2d) 1059.

(6) Under the law, as properly applied by Idaho courts, the California interlocutory decree was not

---

v. Scribner, 54 Idaho, 185, 189, 30 P. (2d) 362. While none of these cases involved a stipulation, the decision of the Supreme Court of Idaho (57 Idaho, 10, 59 P. (2d) 1087) declares the law of that jurisdiction. It follows from the Idaho court's refusal to look into the statutes of Washington that the jurisdiction of the Washington court was presumed to be governed by Idaho law. Under proper proof, the Idaho court would have been compelled to examine the jurisdiction of the Washington court under Washington law."

final. It was not applicable in Idaho under the provisions of Section 13-201, Idaho Code. (Appendix C, p. 45) According to Black in his Law Dictionary "interlocutory" is defined as "provisional, temporary, not final." Sup. Ct. 464. See also: Maloney v. Winston Bros. Co., 18 Idaho 740, 111 P. 1080, 47 L.R.A. (N.S.) 634; Douglas v. Douglas, 22 Idaho 336, 125 P. 796; Mechanics & Metals Nat. Bank v. Pingree, 40 Idaho 118, 232 P. 5; State v. Martinez, 43 Idaho 180, 250 P. 239; Kleinschmidt v. Scribner, 54 Idaho 185, 30 P. (2d) 362; Mason v. Pelkes, 57 Idaho 10, 59 P. (2d) 1087, cert. den. 299 U.S. 615, 81 L. ed 453, 57 Sup. Ct. 319." Not only is there no such a procedure as an interlocutory decree of divorce so far as marital status is concerned in Idaho, but specficially by statute as above mentioned, is not appealable as a final judgment (Sec. 13-201, I.C. Appendix C) and falls in the general category of interlocutory decrees which are not final. As a matter of fact, there is only one kind of a decree of divorce provided by the law of Idaho and that is for absolute divorce. (Sec. 32-601 L.C. Appendix J, p. 67) The Idaho courts have held that even a decree from bed and board cannot be granted and is a nullity. *Radermacher v. Radermacher*, 61 Idaho 261, 100 P. (2d) 955.

(7) There was no finding in the California proceeding that respondent, Gertrude B. Newell, appeared. The reference to such appearance in the findings and in the decree is a mere recital. (Pet. Appendix E, Pages 78-83) The statement of petitioner to the contrary is incorrect.

(8) Idaho courts in exercising their right to inquire into the jurisdiction of a court of a sister state may inquire into the facts necessary to give such jurisdiction, and recitals can always be questioned. *Thompson v. Whitman*, 18 Wall., 463 (85 U.S., XXI, 897), and cases cited in the opinion of the court; *Knowles v. Gaslight Co.*, 19 Wall., 59 (86 U.S. XXII, 71); *Starbuck v. Murray*, 5 Wend., 148, per Marcy, J.; *Rape v. Heaton*, 9 Wis., 328; *Kerr v. Kerr*, 41 N.Y., 272; *Sumway v. Stillman*, 6 Wend., 453; *Noyes v. Butler*, 6 Barb., 613; *Norwood v. Cobb*, 24 Tex., 551; *Carleton v. Bickford*, 13 Gray (Mass.), 591.

Quoting from Justice Brewer of the Supreme Court of the United States, in *Brown v. Fletcher's Estate*, 52 L. ed. 966, at 970:

> "Even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts."

See also *Mason v. Pelkes*, supra.

(9) Petitioner failed to include in his appendices the findings of fact and conclusions of law of the trial court in Idaho and we have, therefore, set the same forth in Appendix A hereto. In such appendix, Paragraph XI, Page 32, the court found that respondent Newell did not appear in the California court; that the recitals as to appearance are untrue; that her letter to one of the eighty judges in the California court was placed "in the file by a person unknown"; that petitioner moved to strike the letter from the file and

the matter was then heard by another judge as a default; that no filing fees were paid; that respondent was a resident of Idaho and did not appear in the California proceeding. In Idaho a letter or a telegram to a Judge is not an appearance. In *Newell v. Newell*, 293 P. (2d) 663, 668 the court said:

> "Respondent's letter did not constitute a personal appearance in appellant's California divorce action, and the trial court properly so held. Rutherford v. Bentz, 345 Ill. App. 532, 104 N.E. (2d) 343; In re Kimball's Estate, 155 N.Y. 62, 49 N.E. 331; Fortier v. Gumelsky, 148 La. 768, 87 So. 741."

In *Rutherford v. Bentz*, 104 N.E. (2d) 243, (Ill. 1952), the Court said:

> "The plaintiffs contend that the telegram sent by the defendant Bentz to the Circuit Court Judge of Champaign County was a general appearance. We do not think so. We agree with the law announced in Feltenstein v. Stein, 51 Ill., App. 426, where it is said that the judge is not the court. The court is a legal entity, created by the Constitution and the judge is the presiding officer only. Under our system, there are three judges of a Circuit Court. Each of these judges when he presides, holds Court. A telegram to either of these judges or a letter while addressed to the judge, as the judge of the Circuit Court of Champaign County, is to the individual and not the Court."

In other words, in the Illinois case, there were only three judges and the court held that his letter to a judge was not a communication to his court. In the case at bar, there were some eighty odd judges, making it even more incredible that anyone should contend that such a letter was an appearance.

Another case is the consideration by a New York Court of a North Dakota divorce decree where absent husband's appearance was based upon a letter filed as an answer. *In re Kimball's Estate*, 49 N.E. 331, 155 N.Y. 62. New York, taking judicial notice under its law of foreign laws, discusses whether this was an answer or an appearance. It found the paper made in New York, not subscribed properly or headed properly in the Court, not acknowledged as required, and not purporting to be a pleading, was not an appearance. It therefore found that jurisdiction of the North Dakota Court to be lacking and its judgment void and of no effect in New York, even though the North Dakota Court found it to be an appearance. An illustrative case is that of *Fortier v. Gumelsky*, 87 So. 741, 150 La. 203, 1921. The Court stated the facts as follows:

> "Counsel for Fortier wrote to the judge, complaining that the time thus fixed was too short — indeed, was in violation of the rules of the court, owing to intervening holidays — and asking for a continuance. The judge paid no attention to this letter, but proceeded to try the case at the time fixed, and to render judgment dissolving the injunction. This he did in absence of Fortier and his

> attorney, but after they had been duly called at the door of the courthouse, as customary in the respondent judge's court."

Later application was made for writs of certiorari mandamus, and prohibition. The Court denied the same on the ground that there could have been no error, because the letter could not take the place of an appearance, saying:

> "This is not such a case, and could not be even if there had been error, and there was none, since a letter cannot be made to take the place of a regular appearance in court, and since the time fixed for the return was not in violation of any rule of court."

(10) If the California law were different from that of Idaho the same was neither pleaded nor proved as to such alleged appearance. In any event, it only pertained to an order to show cause and the letter to the Judge stated that respondent had no funds and no funds were available for her to appear. Any attempt to foreclose her by holding the same to be an appearance and a decree based thereon would be void, because of lack of due process — an unconscionable order. There would have been an abuse of process or a flagrant departure from ordinary judicial procedure, and even if the judgment were final it would not be entitled to full faith and credit. *Andrews v. Andrews*, 188 U.S. 14, 47 L. ed. 366; *Roth v. Roth*, 104 Ill. 35, 44 Am. M. 81.

(11) Petitioner infers that subsequent proceedings

by respondent in California were inconsistent with the decree of divorce in Idaho. Both parties remarried. The Idaho courts found that respondent was a resident and domiciled in Idaho. She was in Idaho some eighteen months. The court found that she and her children had become a part of the community in Idaho, and participated in Community affairs in good faith. (Appendix A, Page 36): she not only established a home, but sent her children to school and it was not until some eighteen months later that she went to Paris, France and was remarried. Petitioner was remarried and lived in California. Respondent's husband was in business in California and she then went with him together with the children. Immediately upon going to California respondent filed her petition in January, 1955 in the Superior Court of the State of California, in and for the County of Los Angeles, setting forth the Idaho decree and praying "the said judgment be established as a valid judgment and that the same be enforced in this action in the manner provided by law": (Appendix D, p. 46) at the same time petitions moved to modify the California interlocutory decree accordingly, setting forth the Idaho decree. (Pet. Appendix I, Page 98). Pending the determination of such action to establish the Idaho decree, the California court entered its temporary order providing for custody of the children and requiring petitioner to support the same. (Appendix E, p. 51). It will be noted in said order that the motion to modify the interlocutory decree in accordance with the Idaho decree were consolidated for hearing and the court thereupon issued an identical

temporary order. Such proceedings were consistent with reliance upon the Idaho decree and for the purpose of establishing the same in California. Petitioner came to Idaho and personally submitted himself to and invoked the jurisdiction of Idaho courts for the trial and full determination of all issues between the parties. Where successive and conflicting judgments in different proceedings between the same parties upon the same issues are had, the last judgment rendered is conclusive. *2 Freeman on Judgments, 5th Ed., Sec. 629, p. 1326; 15 Cal. Jur. Sec. 143, p. 57; 7 Cal. Jur. 10 Yr. Supp. p. 359; California Bank v. Traeger, 10 P. (2d) 51, 215 Cal. 351; Maloney v. Mass. Bonding, 123 P. (2d) 449, 20 C. (2d) 1.* Petitioner, in his pleading to respondent's complaint for divorce, made allegations entitling him, if proved, to a divorce and custody of the children and offered proof with reference thereto at the trial. The

3—"That during the course of the marriage of the parties hereto, the plaintiff has been guilty of extreme cruelty towards this defendant in that she has wrongfully inflicted upon him grievous mental suffering, pain and distress; in particular, that for approximately two years immediately last past, the plaintiff has been carrying on an illicit and clandestine romance with the aforementioned Walter W. Ralphs, Jr., and has continuously lied and misrepresented to this defendant her goings and comings and whereabouts during the day in an attempt to conceal from this defendant her aforementioned illicit relationship, and has treated this defendant in a cold and indifferent manner without justification, provocation or escuse.

That this plaintiff has continuously neglected the children of the parties hereto over a period of the last two years, while she was carrying on this illicit and clandestine romance with the said Walter W. Ralphs, Jr., continuously and practically

California court in California Bank v. Traeger, supra, held:

> "Moreover, the effect of said judgment operating as an estoppel of any claim of . . . Danziger to the property involved in that suit as against any of the defendants herein named, and determining the title to said property as between herself and said defendants, forecloses . . . Danziger from effectively setting up as res judicata the prior judgment secured by the Wake Development Company in the suit to quiet title instituted by it against defendants Danziger, O'Leary and Traeger. The judgment relied upon by appellant is the last judgment in point of time and controls and determines the rights of the parties herein.

daily leaving the home of the parties hereto at approximately 11:00 A.M. and not returning on many occasions until 8:00 P.M.; all of which was without the knowledge of this defendant.

That this defendant has repeatedly tried to get this plaintiff to affiliate with the church, he being associated with the Presbyterian Church, and this plaintiff has continuously and persistently refused to go with said children to Sunday School or to go with this defendant to either Sunday School or church and the entire religious obligation of the parties hereto towards said children has been with this defendant and this defendant has seen to it and taken these children to the Presbyterian Sunday School so that their religious training could not be and would not be neglected.

That the plaintiff herein is not a fit and proper person to have the care, control or management of said children because of the acts and conducts of the plaintiff as herein above alleged; that this defendant is a fit and proper person to have the care, control and custody of said children, and it is in the best interests of said children that he be awarded their care, control and custody."

(cases cited) 'Rights acquired by virtue of a judgment or decree are liable to be terminated in the same manner. Consequently though a matter has once been litigated to a final judgment if it is subsequently relitigated and adjudicated, the last judgment controls and determines the rights of the parties.' Freeman On Judgments (5th Ed.) vol. 2, sec. 629, p. 1326. The rule in such cases is, that the last judgment concludes."

Williams v. No. Carolina, 317 U.S. 287-324, 87 L. Ed., p. 279.

(12) Petitioner argues that by virtue of some peculiar law in California the California interlocutory decree is a final judgment as to marital status. As heretofore pointed out such law was neither pleaded nor proved and, therefore, is immaterial; nevertheless we should call the court's attention to the fact that the case of *Leupe v. Leupe*, 21 Cal. (2d) 145, 130 P. (2d) 697 (Petitioner's Brief Page 28), cited by petitioner, involved an interlocutory decree from which no appeal had been taken within the statutory period and hence review had to be denied. However, it will be noted that so far as the marital status is concerned the court did not overrule, but specifically pointed out, the following cases supporting reference to the lack of severance of marital relations.

"In re Dargie's Estate, 162 Cal. 51, 121 P. 320, and In re Seiler's Estate, 164 Cal. 181, 128 P 334, Ann. Cas. 1914B, 1093."

Referring now to In re Dargie's Estate, supra, and with reference to the wording of the decree heretofore noted, that the decree did not become final until final judgment was entered, the California court said:

> "No final judgment was ever pronounced or entered in the case."
>
> "Clearly there is here contemplated and required further judicial action as a condition precedent to the making and entry of the final judgment. The language is that the 'entry' of the final judgment is to be by 'the court'. This shows that the word 'entry' is not used to describe the mere clerical act by the clerk of writing such judgment in the judgment book, but that it was employed to describe and include the action of the court in rendering or pronouncing the final judgment.* * * The statute at least requires that the court shall again act in the case by declaring the final judgment. Unless it so acts, there is no authority for the entry of any final judgment."

It will be noted that petitioner argues that as to marital status, the interlocutory decree is final in all particulars excepting that the parties are proscribed from remarrying for a period of one year. This is not only contrary to the decisions of the California court above mentioned, but in the case of Seiler's Estate, supra, the California court specifically said:

> "By the terms of the statute it is the final judgment alone that grants the divorce, dissolves the

> marriage, restores the parties to the status of single persons and permits each to marry again. Until the court has by final judgment declared the marriage dissolved, the parties remain in the legal relation of husband and wife * * * it follows that, under the rule declared in the Dargie Case, the appellant was the surviving husband of the decedent, and as such entitled to letters."

With reference to the incidence of community property referred to in the case of *Leupe v. Leupe*, supra, we shall discuss the same under the heading of Incidence of Community Property.

(b) Incidence of Community Property

(1) The only property involved in Idaho was a Buick station wagon, which was in Idaho at all times and never in California during any period involved in the California proceedings. As to such station wagon, petitioner personally appeared before the trial court in Idaho and submitted himself to its jurisdiction regardless of any action or proceedings in California or otherwise. The station wagon was in the jurisdiction of the Idaho court, the parties had submitted themselves to its jurisdiction and the order made was simply pending final determination. The application shows that petitioner stated to the trial court, "the car, I would want it to still be subject to the jurisdiction of this court." (Reporter's Transcript 193, Page 329) The order of contempt sets forth all of the facts quite fully. (Appendix F, p. 55) Petitioner specifically and

personally stated in open court that all he wanted to do was *use* the Buick station wagon.

> "All I want to do is to use it during the windup of this affair, unless the Court follows the judgment and awards it to me exclusively. I need it in my business particularly because there is no public transportation from where I live." (R. 193, Tr. 329-330).

He did not wish the title, but only the use pending final determination. In his application he said,

> "*and the car I would want it to still be subject to the jurisdiction of this court, the rights in the car, whether the court follows the California judgment or not. I have generally appeared in Idaho, the car will be before the court to decide." (R. 193, Tr. 9).

The order of contempt then shows that having upon his application obtained the use of the Buick station wagon pending litigation, petitioner took the station wagon to California, "deceived the court" in mortgaging the car there and then selling the same in California, in violation and in defiance of the order which he personally sought from the court. (Appendix F, p. 56) Not only was the car never within the jurisdiction of the California court during the proceedings there, but the order made was only temporary upon the application of petitioner and upon his specific statement that it would be subject to the jurisdiction of the Idaho court.

(2) Here again petitioner argues California law as above noted. None was pleaded or proved. However, even in the case of Leupe v. Leupe, supra, the court reserved judgment upon the problems of disposition of property where there is a reconciliation before a final decree and in the subsequent case the court held:

> "It would appear that the proper solution of this problem would be to hold that the interlocutory decree may make a present disposition of the community property, but that the title thus conveyed is limited and conditional until the entry of the final decree. A reconciliation before that time or the death of one of the parties, and perhaps other circumstances, would prevent the condition title from becoming absolute." Wilson v. Wilson, 172 P. (2d) 568, Cal. App. 2d (1946).
>
> ". . . portions of the interlocutory decree purporting to make an immediate disposition of property are erroneous . . ." Gudelj v. Gudelj, 259 P. (2d) 656, Cal. 2d (1953); Forbes v. Forbes, 257 P. (2d) 723, Cal. App. 2d (1953).

(c) Incidence of Custody of Children

(1) The children involved were in Idaho prior to and during the proceedings which were had in California. Petitioner again argues peculiar California law which was neither pleaded nor proved. Hence, the Idaho courts applied Idaho law and in Idaho the question of custody is controlled by fitness of a party at the time of hearing. In *Moss v. Vest*, 74 Idaho 328, 262 P. (2d) 116, (1953), the Supreme Court said:

> "Whether the petitioner as mother of the child is the proper person to have the custody is controlled by a determination of her fitness at the time of the hearing as it relates to the welfare of the child. Newman v. Newman, 109 Cal. App (2d) 359, 240 P. (2d) 682; Sorrels v. Sorrels, 105 Cal. (2d) 465, 234 P. (2d) 103."

As to the effect of a foreign order of custody, the Court has also disposed of the question in the case of *Cole v. Cole*, 68 Idaho 561, 201 P. (2d) 98, where it said:

> "Where custody of the children is fixed by a decree of divorce, domicile of the children is an additional consideration affecting jurisdiction. In Duryea v. Duryea, supra, this court held that a court is without right in a divorce suit to award custody of the children of the parties then domiciled in another state and that in a subsequent controversy the same parties in the state of the children's domicile, the decree would be accorded no extraterritorial effect; that all questions affecting the right to custody would be investigated anew despite the appearance of the parties in the former suit and the litigation by them of their respective claims to custody."

It will be noted that in the last case cited there was personal jurisdiction in a sister state. The Idaho court nevertheless held:

> "*decree is a conclusive adjudication of all questions affecting the right to custody to its date. It is not an adjudication in futuro, it is conclusive only to its date."

In any event, the whole matter involved in conflicting decrees with reference to the incidence affecting children has recently been determined by the Supreme Court of the United States. In the case of *May v. Anderson*, 345 U.S. 528, 97 L. ed. 1221, the parties were domiciled in Wisconsin, and it was agreed that the wife should take the children to a place in Ohio and think over her future course. When she did not return, the husband obtained an exparte decree in Wisconsin, awarding him the children. Pursuant to this decree, the husband obtained the children, who remained with him in Wisconsin until he permitted them to visit their mother in Ohio. Inasmuch as the husband had permitted the children to go to Ohio to visit their mother only temporarily, he filed proceedings in Ohio to obtain the children, based upon the decree in Wisconsin. The Supreme Court of the United States held that even though the husband had custody of the children in Wisconsin and only temporarily permitted them to go Ohio to visit their mother, nevertheless the right to custody was the personal right of the mother and could not be cut off by a default decree and that such decree was not entitled to full faith and credit, *regardless of whether or not the children were technically domiciled in Wisconsin.*

As illustrative of what we mean by the dignity of

precise analysis, the Supreme Court of the United States clearly makes divisible the several incidences of a divorce decree. In the case of *Estin v. Estin*, 334 U.S. 541, 92 L. ed. 1561, the Supreme Court of the United States clearly held that although the requirements of full faith and credit are exacting, this does not mean that because one state can by a decree change the legal incidence of the marriage relationship, it may also change the instance of alimony. In other words, the Supreme Court makes the decree divisible and only gave full faith and credit effect to a Nevada decree insofar as it affected the marital status, but made it ineffective so far as the issue of alimony was concerned.

In the case of *May v. Anderson*, supra, the Supreme Court of the United States follows the same analysis and reasoning, holding that while recognizing the Wisconsin divorce as to the incidence of the marriage status, nevertheless, "in the instant case, we recognize that a mother's right to custody of her children is a personal right, entitled to at least as much protection as her right to alimony."

Referring to an argument similar to that of petitioner Newell as to domocile, the Supreme Court again settled this question for all purposes by saying:

> "In the instant case, the Ohio courts gave weight to appellee's contention that the Wisconsin award of custody binds appellant because, at the time it was issued, her children had a technical domicile in Wisconsin, although they were neither resident nor present there. We find it unnecessary

> to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive the mother of her personal right to their immediate possession."

(2) As heretofore noted, petitioner made an issue as to the custody of the children in the Idaho courts. He pleaded his fitness and alleged the unfitness of respondent. (R. 193, Tr. 246-247) He offered proof when he was on the witness stand as to his fitness. (R. 193, Tr. 175) He submitted himself to the jurisdiction of the trial court as to custody. (R. 193, Tr. 202).

(3) Although, as hereinbefore noted, no California law was pleaded or proved, in view of petitioner's statement as to California law, we call the court's attention that California also holds that technical domicile of children does not provide jurisdiction. 9 Cal. Jur. 130, p. 786. In the case of *Ex parte Brown*, 203 P, (2d) 799, 90 C A2d 65, the California court held:

> "The Nevada decree, of course, was not final with respect to the matter of custody. It was subject to modification either by the Nevada courts or the courts of California. However, the decree of a foreign state with respect to custody will be respected by a California court, and will be superseded by a contrary award of custody only upon the ground of changed circumstances."

CALIFORNIA RESTRAINING ORDER

(1) Petitioner, desiring to take the depositions of certain witnesses residing in California, applied to the California court for the issuance of subpœnas stating under oath that the testimony of such witnesses was material to the issues in the Idaho divorce case pertaining to (a) alleged misconduct of respondent, (b) custody of minor children, and (c) alleged cruelty by respondent to petitioner. In the affidavit of petitioner setting forth such reasons, petitioner set out the Idaho statutory provisions. (Appendix G, p. 60). The California provisions are similar. (R. 193, Tr. 202) Whereupon, respondent made a similar application for the issuance of subpœnas to take the deposition of certain witnesses residing in California. In such proceeding petitioner reversed his position again under oath, alleging that there are no such issues in the Idaho divorce court, which he had stated under oath existed, and moved to quash the subpœnes, to restrain respondent from taking such depositions and also to restrain her from taking any proceedings with reference to divorce, property or custody of children anywhere in the world.

(2) Such proceedings were special and statutory. The court had no jurisdiction to exercise general equity powers to restrain respondent as above mentioned. The special statutory proceedings were simply to issue the subpœnas or deny the same. Respondent proved the California law and the pleadings were amended to conform thereto. It was testified that the proceedings for issuance of subpœnas was a special statutory pro-

ceedings similar to Idaho. (R. 193, Tr. 202) It was testified that the court had no power to go beyond the petition for subpœnas; it had no equity juprisdiction. It could not go beyond the issuance or denial of the subpœna. (R. 193, Tr. 202-203) In *1 Cal. Jur. (2d), p. 635*, the rule is laid down as follows:

> "Special proceedings established by statute must strictly follow the statute, and a court setting therein has no general or equitable jurisdiction."

In the disposition of petitioner's application, the California court made the following minute entry: (Appendix I, p. 66).

> "After oral argument, the motion of defendant to quash subpœna and subpœna duces tecum is granted, and plaintiff is restrained from taking depositions in this county to be used in the Idaho proceedings."

Such minute entry was clearly within the special proceeding issue as to whether the subpœnas should be issued or quashed. As shown by the findings of fact (Appendix A), petitioner in spite and in disregard of such minute entry prepared and had signed by one of the eighty judges the order now referred to as the California Restraining Order. It was not in accordance with the minute entry and cannot extend the same. In the case of Nealis v. Carlson, 219 P. 2d) 56, 98 C A (2d) 65, the California court said:

> "* where * no reference is made in the minute

> order for the preparation of a formal order, the only appealable order is the minute order, and the formal order later filed is functus officio."

In the case of Pessarra v. Pessarra, 183 P. (2d) 279, 80 C A (2d) 965; the Court of California also said:

> "That the court had no power to change or modify that order (minute entry) in the manner attempted by the order of April 4, 1947; that the order of April 4 was totally void and the appeal therefrom abortive;"

(3) Moreover without notice to respondent and without the filing or serving of any findings or conclusions, petitioner obtained said restraining order. Respondent had no notice or information with reference thereto until a few days before trial. (R. 193, Tr. 197) There was no service of any notice, findings or conclusions. (R. 193, Tr. 197) Again respondent introduced the California law. First, reference was made to the code provisions. (R. 193, Tr. 199, 200) In a final judgment as contended by petitioner, findings and conclusions were required. Rule 19 G of California Court was introduced requiring service and filing of such findings and conclusions (R. 193, Tr. 199) Then it was testified that under the California law a judgment without findings of fact and conclusions of law is a nullity. (R. 193, Tr. 200). Respondent's witness gave the citations and cases sustaining such opinion. The witness testified that under the rule in California, the court had no jurisdiction to enter the

order. (R. 193, Tr. 202). In the case cited by the witness, *Kaliterna v. Wright*, 212 P. (2d) 32, 36, the court said:

> "On January 5, 1948, the court signed findings of fact and conclusions of law. For some reason they were not filed before the judgment was signed and filed. This was on January 8. Thereafter, on July 2, pursuant to motion and after argument, the court ordered the findings and conclusions to be filed nunc pro tunc as of January 5. We have recently held that, where findings are required and are not waived, a judgment without findings is a nullity."

Petitioner questions the testimony of the lawyer witness upon the ground that he was a relative. Manifestly, this is a question of weight of the evidence and not a federal question. The California court had no general equity power in this special proceeding. The order could not change the minute entry and with no notice, findings of fact or conclusions of law, the order was a nullity.

(4) Petitioner points out that an appeal had not been taken by respondent from such restraining order. The Supreme Court of California has rendered its decision upon such appeal and held that respondent had received an Idaho decree of divorce which was affirmed by the Supreme Court of Idaho and hence the provisions of the restraining order are no longer at issue. It also held that the orders for custody in the action brought by respondent to establish the Idaho decree in Cali-

fornia and motion for modification superseded previous orders. (Appendix H)

(5) It is not clear as to just what affect petitioner attributes to the California restraining order upon respondent's application for subpœnas to take depositions; he apparently views the order as final but concludes that it was only in personam and that in comity and discretion the Idaho courts should have restrained respondent. The discretion of the trial court in considering the restraining order as one in personam was sustained by the Supreme Court of Idaho, saying that to restrain respondent pending the appeal from the California restraining order went to the sound discretion of the court and that "no abuse of that discretion appears, particularly in view of the invalidity of such restraining order." Moreover, so far as exercising discretion in granting of stay, it has been unanimously held that if the jurisdiction is even doubtful, the motion should not be granted, *St. Johns v. Putnam*, 220 N.Y.S., 141, 128 Misc. 714, and in any event, an order restraining a party from going to another state to try a matter is not entitled to full faith and credit where it is not on the merits. *Hock vs. Bryam*, 230 N.W. 823 (Minn.); *Iowa-wire Bridge Co. vs. Phoenix Finance Corp.* 25 A. 2d 383 (Del.), Cert. Denied, 317 U.S. 671, 87 L. ed. 539.

(6) Petitioner was in court during the entire trial. Testified as a witness, but did not testify as to the law of California, although he was a practicing attorney in California, and did not attempt to refute the testimony of respondent's witness as to the law of Califor-

nia to the effect that such restraining order was a nullity in California.

(7) We have already discussed under California Interlocutory Decree the question of the custody of children and under the rule and cases there cited the restraining order could have no affect so far as the custody of the children was concerned in the State of Idaho. The Idaho court on August 22, 1953 restrained petitioner from taking any action interfering with the custody and care by respondent of the children. (R. 193, Tr. 228) The court found that in violation of such order, petitioner obtained the restraining order in California. (Appendix A, Paragraph 11) While so restrained by the Idaho court, petitioner obtained said California restraining order purporting to restrain respondent from taking any action or proceedings with reference to the custody and care of the children in Idaho in direct violation of the restraining order theretofore issued by the Idaho court protecting respondent in the care and custody of such children and then proceeded to ask the Idaho court to recognize the later restraining order as a matter of comity and sound discretion!

Accordingly the petition for Writs of Certiorari should be denied.

Respectfully submitted,

W. D. EBERLE,
T. H. EBERLE,
J. L. EBERLE.

APPENDIX

Appendix A

IN THE
DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF GOODING

GERTRUDE B. NEWELL, *Plaintiff,* vs. ROBERT M. NEWELL, *Defendant.*	Findings of Fact and Conclusions of Law

This cause came on regularly to be heard before the Court, without a jury, on July 12, 1954, the defendant, Robert M. Newell being personally present in court during the trial, and also represented by his counsel, John A. Carver Jr., and the plaintiff, Gertrude B. Newell being also personally present in court, and represented by her counsel, J. L. Eberle and T. H. Eberle, and witnesses having been sworn and examined and documentary proof offered, said cause having been submitted for consideration and decision, and the Court having duly considered the law and the evidence, renders the following Findings of Fact and Conclusions of Law; and hereby finds the facts to be as follows:

FINDINGS OF FACT

I

That plaintiff herein, Gertrude B. Newell and de-

fendant herein, Robert M. Newell intermarried in Pasadena, State of California on or about November 1, 1942, and ever since have been husband and wife.

II

That said plaintiff now is and for more than six weeks immediately preceding the commencement of this action, which was filed August 22, 1953, has been a resident of and domiciled in the State of Idaho; said plaintiff expressed to her close friends and family in May and June 1953 her intent to permanently leave the State of California, to escape defendant's conduct toward her, and actually abandoned her home and residence in California in June 1953 and came to Idaho where she and her family had been well known for many years and had many friends, and on or before July 10, 1953 established her residence in Idaho, away from the oppresive and injurious conduct of defendant and has maintained since then a healthy and peaceful home for herself and children in Idaho; said plaintiff and said children at all times since the establishment of such residence have been and now are within the jurisdiction of this Court.

III

That as issue of the aforesaid marriage there have been born to plaintiff and defendant three children, namely, Robert M. Newell, Christine Lindsey Newell and William Charles Newell, all minors; that said children left California with plaintiff in June 1953 and came to Idaho as hereinbefore set forth, and at all

times since have enjoyed the love, care and affection of said plaintiff and are now enjoying the love, care and affection of said plaintiff, and in her custody residing and domiciled in the residence of said plaintiff in Idaho.

IV

That said plaintiff is a fit and proper person to have and be awarded the custody, care, education and control of said minor children, and the best interests of said minor children require that they be kept in the custody of said plaintiff, subject to reasonable rights of visitation of said children by said defendant, at such time or times and at such place or places as plaintiff may determine to be for the best interests and welfare of said children, but not oftener than once each month, upon giving to plaintiff at least 24 hours notice in advance of any time said defendant desires to exercise such right of visitation.

V

That since their marriage said defendant has treated plaintiff, without cause, excuse or justification, with extreme mental and physical cruelty, and his conduct has impaired plaintiff's health and caused grievous mental suffering, making it impossible for plaintiff to continue her marital relations with defendant; that as a result of said conduct plaintiff left and separated from said defendant on or about July 1, 1953 and did so with justification and established her own and separate residence in the State of Idaho as hereinbefore set forth; and upon the facts presented to the Court it

would be fair and proper to award all of the community property within the Court's jurisdiction to said plaintiff who is the innocent party to this cause.

VI

That the only community property within the jurisdiction of this Court is the community interest of the parties hereto in one Buick Station Wagon, certain possessory rights of which were granted to defendant, by order made herein on January 15, 1953; that such community property interest is determined to be of the value of $825.00, which should be awarded to the plaintiff and defendant should be directed to pay the same to plaintiff; and in the event said Buick Station Wagon is returned to the jurisdiction of this Court by defendant, the same should be impressed with a lien in said sum in favor of plaintiff.

VII

That defendant personally appeared in the above Court and cause and subjected himself to its jurisdiction.

VIII

That defendant is an able bodied man, an attorney at law and capable of supporting himself and said minor children, with an income of about $10,000.00 per year, and defendant should be required to pay for the support of said minor children, and the sum of $75.00 per month for each child, during minority or until further order of this Court, is hereby fixed as a proper amount for the support of said children, and defendant should be required to pay the same as follows:

$225.00 for the month of July,
$225.00 for the month of August
$225.00 for the month of September

should be paid on or before September 16, 1954, and thereafter said defendant shall pay $75.00 per month for each of said children, as above specified, on the 1st day of each and every month commencing October 1, 1954.

IX

That the Court finds that $500.00 is a reasonable additional amount to allow plaintiff for counsel fees, and the sum of $43.65 as special costs, in addition to statutory cost bill that may be filed upon entering of decree.

X

That in order to protect the physical and economic well being of plaintiff and the minor children, the defendant should be restrained from molesting or interfering with them.

XI

That the Court has considered the interlocutory decree of divorce made and entered in the Superior Court of the State of California in and for the County of Los Angeles known as Pasa-D-11260 on or about September 25, 1953, and recognizes the same as, and finds that it is, an interlocutory, ex parte, default decree of divorce; that said interlocutory decree was entered upon default in a proceeding where process was served on the plaintiff herein in Idaho and in which she did not appear or participate in any manner; that the recitals in said de-

cree to the effect that the plaintiff herein appeared are untrue and the Court finds the facts to be that defendant herein well knowing that plaintiff had separated from him, and the reasons therefor, and had come to Idaho and established residence, endeavored to acquire an advantage by filing a proceeding for divorce in California a few days before plaintiff filed the above entitled cause; that in connection with an order to show cause relating to the custody of the children, which were in Idaho, the plaintiff herein wrote a letter to the Honorable Allan T. Lynch, one of the eighty judges of said Los Angeles County Superior Court, which letter among other things stated that she had no funds to come to California in connection with said custody order to show cause; how said letter came to be placed in the file of said proceeding does not appear, although presumably it was by said judge; that the defendant herein being a lawyer and a member of the Bar of the State of California moved to strike the letter from the files and the same was ordered stricken; that the matter was then heard by another judge as a default, and the interlocutory decree of divorce above mentioned entered; that the papers including the recital above mentioned were prepared by the defendant herein; that said letter was written by plaintiff herein without the knowledge of her counsel; that said plaintiff herein was a resident of Idaho and not of California and service was made upon her in Idaho and not in California; that said letter was not filed by plaintiff herein, no filing fees were paid and said plaintiff herein did not appear in said California proceeding, nor was said

letter an appearance; that were this Court to accept said recital of appearance based upon said letter, no funds having been sent to plaintiff to appear and no action taken to protect her, or an opportunity to appear after being notified that the wife was caring for the children and was without funds, the same would be without due process and in violation of the requirements of due process of law; that the defendant herein has appeared generally in this Court, has fully participated and has received full opportunity to be heard by this Court; that said decree is interlocutory, ex parte and not final; that at the time of preparing and obtaining said decree said defendant well knew that the above entitled Court on August 26, 1953 had restrained him from interfering with the care and custody by plaintiff of said minor children and well knew that the said children were in the care and custody of plaintiff in Idaho; that defendant nevertheless prepared said California decree with provisions granting custody of said children to himself, and also community property in Idaho in the form of a Buick Station Wagon; that said California court had no extraterritorial jurisdiction over the custody of said children or said Buick Station Wagon.

XII

The Court has recognized and given consideration to that certain restraining order issued by the Superior Court of the State of California in and for the County of Los Angeles in case No. 629775, and the Court finds the facts to be as follows:

That said defendant first served notice upon said

plaintiff as required by the law of Idaho for the taking of the depositions of certain witnesses in California whose testimony was material to the issues in this cause; that thereupon the defendant herein filed a special proceeding in the State of California, being case No. 92495 for the issuance of subpœnas in connection with the taking of such depositions; that in such special proceeding defendant made an affidavit to the effect that it was necessary to obtain such subpœnas because the testimony of certain witnesses was material to the issues of divorce, custody of the children, cruelty of defendant, title to personal property and adultery; that plaintiff herein also desiring to take depositions of witnesses whose testimony was to be used in the above entitled cause made a similar application under the special proceeding providing for the issuance of subpœnas in connection with such depositions, said case being No. 629775, and in such cause the defendant herein filed an affidavit within one week after the first affidavit above mentioned, and set forth under oath that there were no issues in the above entitled cause, and therefore the issuance of subpœnas should be denied and also in the same proceeding had an order to show cause issued why plaintiff should not be restrained from proceeding with the above entitled cause in Idaho; that the Court made an order by minute entry to the effect that the issuance of subpœnas was denied, but a few days later defendant prepared and had signed an order beyond the issues in such special proceeding providing for the restraint of plaintiff from proceeding with the above entitled action in Idaho; that defendant

gave no notice of such order to anyone and no Findings of Fact and Conclusions of Law or bond were filed; that such proceedings were statutory and the Court had no general or equitable jurisdiction to issue any restraining order; that defendant does not contend that such order is res adjudicate, but that it is a final order. Inasmuch as no Findings of Fact and Conclusions of Law were prepared or filed, no notice given and the order was not within the special proceedings or pleadings, said order is a nullity and not binding upon this Court.

XIII

That plaintiff and her children since their arrival in Idaho have lived and made their home in Idaho for some 13 months and have become a part of the community in Boise, making a home there and have taken steps to be known as residents of Idaho, participating in its community affairs, all of which actions were taken in good faith and with the intent of making Idaho their permanent home.

XIV

Excepting as otherwise hereinbefore specifically set forth all of the allegations of the pleadings of plaintiff are true and none of the allegations or denials or defenses of the pleadings of the defendant are true and all of the facts upon which the defenses and pleadings of defendant are predicated are untrue, excepting as hereinbefore specifically set forth, all evidence and testimony supplied by defendant contrary to the facts hereinbefore set forth is untrue or contrary to the reasonable inferences to be drawn.

As Conclusions of Law from the foregoing Findings of Fact, the Court hereby finds and decides.

CONCLUSIONS OF LAW

I

The moving from one place of residence to another with intent to abandon the old residence and establish a residence in the new place is in law a change of residence which may be accomplished in one day; plaintiff abandoned her residence in the State of California in the month of June, 1953, came to Idaho and established her residence in the State of Idaho on or before July 10, 1953, and at all times since has been and now is a resident of and domiciled in the State of Idaho.

II

Upon the duly authenticated record of the proceeding in the California Court, Pasa-D-11260 introduced in evidence, this Court must presume the validity of the same and the burden of proving any invalidity was on plaintiff; and to the extent hereafter set forth plaintiff has sustained that burden by clear and convincing evidence.

III

This Court does not take judicial notice of the laws of another State and without evidence it will be assumed the laws are the same as those of Idaho.

IV

No interlocutory decree or judgment in Idaho is

appealable excepting an interlocutory judgment in an action for partition of real property.

V

An interlocutory decree is not final.

VI

The Court may inquire into the jurisdiction of the Court in which the foreign judgment was given to pronounce it or the right of the State itself to exercise authority over the person or the subject matter.

VII

Recitals in findings, conclusions, judgments or decrees can always be questioned and even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts.

VIII

The Court is a legal entity and the judge is the presiding officer only. Where there are more than one judge if he holds court, he presides. A letter to any of such judges, while addressed to the judge is to the individual, and not the Court.

IX

A letter to a judge of the Court cannot be made to take the place of a legal appearance in Court.

X

Where a letter is written by a litigant to one of eighty judges of a Court, no filing fees being paid, and counsel for such litigant having no knowledge that

such letter was written, and the litigant makes no other appearance, by person or otherwise, and such letter is placed in the file of the proceeding, presumably by the judge to whom it was written, such letter does not constitute a personal appearance.

XI

The Court may always inquire as to whether the Court entering a judgment in a sister State had jurisdiction of the subject matter and of the person, and whether the same was substantially responsive to the issue tendered by the pleading.

XII

Under the law of California the proceeding for the issuance of subpœnas in connection with the taking of deposition in a special proceeding established by statute and the same must strictly follow the statute and a Court sitting therein has no general or equitable jurisdiction.

XIII

Where application was made in a special proceeding in the State of California for the issuance of subpœnas, an order denying the same which included an injunction and restraining order in the exercise of equity jurisdiction, without notice of the filing of such order and without Findings of Fact and Conclusions of Law was without jurisdiction and a nullity under the law of California.

XIV

Under the law of California a final decree or order

without Findings of Fact and Conclusions of Law, unless waived, and filed without notice is a nullity.

XV

Whether a mother is a proper person to have custody is controlled by determination of her fitness at the time of the hearing as it relates to the welfare of the child.

XVI

A Court is without right in a divorce suit to award custody of the children of the parties then domiciled in another State; and in the subsequent controversy between the same parties in the State of the children's domicile the decree would be accorded no extraterritorial effect.

XVII

A mother's right to custody of her children is a personal right which cannot be cut off by an ex parte decree, at least with binding effect upon a sister State.

XVIII

The interlocutory decree of divorce in the State of California is ex parte, interlocutory and not final, and not entitled to full faith and credit; and the plaintiff herein did not personally appear in said action, nor were the children present or domiciled in the State of California at the time of the issuance of said decree, nor was the Buick Station Wagon in the State of California at the time, and said decree had no extraterritorial effect upon either the children or the Buick Station Wagon.

XIX

That the restraining order issued in said case No. 629775 is not res adjudicata, not entitled to full faith and credit, not final and under the law of California was issued by a Court without general or equitable jurisdiction in the proceeding in which it was issued and was not substantially responsive to the special proceeding involved, and is a nullity.

XX

No evidence was offered as to the California law with regard to the interlocutory decree of divorce hereinbefore mentioned and it is assumed that it is the same as the law of Idaho; that the letter written by plaintiff was not an appearance; that the recital in said interlocutory decree that plaintiff appeared is false and not in accordance with the facts; that said decree could not cut off plaintiff's right to the custody of the minor children; that said decree could not determine plaintiff's right to community property in Idaho; that plaintiff did not appear in said proceeding personally or by counsel and was a resident of the State of Idaho at the time of the entering of said decree; that plaintiff was served in said proceeding by substituted service in Idaho; that said interlocutory decree was not based on personal service, nor on any personal appearance and is not final, and was an interlocutory, ex parte and default decree based on substituted service, has no extraterritorial effect and is not res adjudicata and is not entitled to full faith and credit.

XXI

For the protection of the physical and economic well being of the plaintiff and minor children, defendant should be restrained from molesting or interfering with them.

Decree should be entered accordingly.

Dated August 16th, 1954.

D. H. SUTPHEN,
District Judge.

Appendix B

SECTIONS OF IDAHO CODE

9-101. Facts judicially noticed.—Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of legal expressions.

2. Whatever is established by law.

3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States.

4. The seals of all the courts of this state and of the United States.

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this state and of the United States.

6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States.

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference. (C.C.P. 1881, § 896; R.S., R.C., & C.L., § 5950; C.S., § 7933; I.C.A., § 16-101).

9-304. Proof of Statutes Act—Publications covered. —Printed books or pamphlets purporting on their face

to be the session or other statutes of any of the United States, or the territories thereof, or of any foreign jurisdiction, and to have been printed and published by the authority of any such state, territory or foreign jurisdiction or proved to be commonly recognized in its courts, shall be received in the courts of this state as prima facie evidence of such statutes.

9-308. Oral evidence of common law — Reports of decisions. — The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of another state, territory or foreign country, as are also printed and published books of reports of decisions of the courts of such state, territory or country, commonly admitted in such courts.

9-307. Certified copies of foreign laws and writings. —Admissibility.—A copy of the written law, or other public writing, of any state, territory or country, attested by the certificate of the officer having charge of the original, under the public seal of the state, territory or country, is admissible as evidence of such law or writing.

Appendix C

IDAHO CODE

13-201. Judgments and orders appealable — Time for taking appeals.—An appeal may be taken to the Supreme Court from a district court:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered; from a judgment rendered on an appeal from an inferior court; from a judgment rendered on an appeal from an order, decision or action of a board of county commissioners; within ninety days after the entry of such judgment.

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of place of trial; from any special order made after final judgment; and from an interlocutory judgment in action for partition of real property; within sixty days after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk.

Appendix D

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
No. D 479 839

COMPLAINT TO ESTABLISH FOREIGN JUDGMENT FOR SUPPORT OF MINOR CHILDREN, FOR COSTS AND FOR ATTORNEY'S FEES

GERTRUDE B. RALPHS,

Plaintiff,

vs.

ROBERT M. NEWELL,

Defendant.

Plaintiff complains and alleges:

I

That on or about the 1st day of November, 1942, the plaintiff and defendant were married in the State of California; that there are three children the issue of said marriage; namely, ROBERT M. NEWELL, JR., age 10; CHRISTINE LINDSAY NEWELL, age 7; and WILLIAM CHARLES NEWELL, age 6.

II

That at all times herein mentioned the defendant ROBERT M. NEWELL has been and now is a resident of the County of Los Angeles, State of California, and an attorney at law duly licensed to practice and practicing his profession in the State of California.

III

That on the 22nd day of August, 1953, the plaintiff commenced an action for divorce in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, said action being entitled GERTRUDE B. NEWELL, Plaintiff vs. ROBERT M. NEWELL, defendant and bearing No. 6462 in the records and files of said court; that said defendant was duly served with process therein, and on or about the 12th day of September, 1953, appeared in said action and submitted himself personally to the jurisdiction of said court.

IV

That thereafter such proceedings were had in said court and action that on the 31st day of August, 1954, a decree was duly made, entered and docketed in said court, dissolving the bonds of matrimony between this plaintiff and the said defendant and awarding to plaintiff the care, custody, education and control of the said minor children, namely, ROBERT M. NEWELL, JR., CHRISTINE LINDSAY NEWELL and WILLIAM CHARLES NEWELL, and ordering the defendant to pay to plaintiff for the maintenance and support of said minor children the sum of $675.00, payable on or before September 16, 1954, and further an additional sum of $75.00 per month for each of said three children during their minority or until further order of said court, on or before the 1st day of each month, commencing October 1, 1954; and further ordering the defendant to pay to plaintiff as and for

attorney's fees the sum of $500.00, together with costs in the amount of $43.65 in addition to statutory costs taxed in accordance with memorandum of costs in the amount of $182.00; and further ordering the said defendant to pay to plaintiff the sum of $825.00, being the amount of the community property interest of the plaintiff and said defendant in a certain 1953 Buick Stationwagon automobile and which amount was thereupon awarded to plaintiff as her sole and separate property. That a full, true and correct copy of said decree is attached hereto, marked Exhibit "A", pleaded and made a part hereof by reference the same as though set forth herein in full.

V

That no part of said sums ordered paid by defendant to plaintiff have been paid, except that the defendant has paid the sum of $112.50 on account of support for said minor children; that there is now due, owing and unpaid from defendant to plaintiff, under and by virtue of the terms and provisions of said judgment and decree, the total sum of $3,013.15, together with interest thereon at the rate of 7% per annum from the dates said amounts became due as hereinbefore set forth.

VI

That is was necessary for plaintiff to employ and retain counsel to bring this action to enforce payment of said judgment, for child support; that plaintiff has no funds with which to pay her attorney fees and costs of suit herein; that defendant is an able-bodied man

capable of earning and earning sufficient sums to enable him to pay plaintiff's attorney fees and costs of suit herein.

WHEREFORE, plaintiff prays judgment against the defendant as follows:

That said judgment be established as a foreign judgment, and that the same be enforced in this action in the manner provided by law; that it be adjudged and decreed that there is now due and owing to the plaintiff from the defendant the said sum of $3,013.15; together with interest as provided by law; for plaintiff's costs of suit herein; for reasonable attorney's fees, and for such other and further relief as to the Court may seem meet and proper in the premises.

GLENN A. LANE,
Attorney for Plaintiff.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

GLENN A. LANE, being first duly sworn says that he is an attorney at law admitted to practice before all courts of the State of California and has his office in Los Angeles, Los Angeles County, California, and is the attorney for plaintiff in the above entitled action; that plaintiff is unable to make the verification because she is absent from said county and for that reason affiant makes this verification on plaintiff's behalf; that he has read the foregoing Complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are herein

stated on information or belief; and as to those matters he believes it to be true.

GLENN A. LANE,

Subscribed and sworn to before me this 4th day of January, 1955.

MARJORIE E. OAKLEY,
Notary Public in and for said County and State.

Appendix E

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
No. D-479839

TEMPORARY ORDER FOR CUSTODY AND SUPPORT OF MINOR CHILDREN

GERTRUDE B. RALPHS,

Plaintiff,

vs.

ROBERT M. NEWELL,

Defendant.

The above-entitled matter having come on regularly for hearing on the 8th day of March, 1955, before the Honorable Kurtz Kauffman, Judge presiding, in Department Pasadena "B", on Order to Show Cause issued pursuant to plaintiff's Application for Temporary Order for support of minor children and for attorney's fees and court costs pending trial of the within action; plaintiff appearing in person and by her attorney, Glenn A Lane, Esq., and defendant appearing in person and by his attorney, Ernest J. Zack, Esq., and the parties hereto and their respective counsel having stipulated in open court that the within matter might be consolidated for hearing with that certain case, between the same parties, in the above-entitled court, entitled "Robert M. Newell, Plaintiff, vs. Gertrude B. Newell, Defendant," bearing number Pasadena D-11260, in the records and files of the above-

entitled court; and said cases having been duly consolidated for hearing, by order of Court; and evidence, both oral and documentary, having been introduced; and counsel having argued said matters and said matters having been duly submitted to the Court for its decision; and the Court being fully advised in the premises hereby finds that both plaintiff and defendant are residents of the County of Los Angeles, State of California; that ever since the 8th day of February, 1955, the three minor children of the parties hereto, namely, Robert M. Newell, Jr., Christine Lindsay Newell and William Charles Newell, have been and now are residing with and in the physical custody of defendant, father, in the City of San Marino, County of Los Angeles, State of California; and that the plaintiff and defendant are each fit and proper persons to have the custody and control of the minor children of the parties hereto; and

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff and defendant are each fit and proper persons to have the custody and control of the minor children of the parties hereto; and said three minor children of the parties hereto, namely, Robert M. Newell, Jr., Christine Lindsay Newell and William Charles Newell, are hereby placed under the joint legal custody of the parties hereto with physical custody at times in the plaintiff and at other times in the defendant, as follows:

Physical custody of said minor children shall remain with defendant until the middle of the Easter vacation of this year, to-wit, Wednesday, the 6th day of April,

1955, at which time physical custody shall be and remain with the plaintiff, except as hereinafter provided. During the summer vacation period each year, the physical custody of said minor children shall be, and is hereby, divided equally between the parties hereto; the first half of each said summer vacation, the physical custody of said minor children shall be and is with the plaintiff, mother, and the second half of such summer vacation shall be and is with the defendant, father. Each party shall share equally the other vacation periods and holidays not herein specifically provided for; that is, during each and all of the other vacation periods and holidays not herein specifically provided for, the physical custody of said minor children shall be divided equally between the parties hereto.

At the beginning of the fall school term each year, the physical custody shall be with, and is hereby granted to, the mother. Each party shall have the right of reasonable visitation of the children when they are in the physical custody of the other party.

When the plaintiff, mother, has physical custody of said minor children, the defendant shall pay, and is hereby ordered to pay, to the plaintiff, mother, for the support and maintenance of each of the said three minor children, the sum of Seventy-five Dollars ($75.00) per month, payable in advance, on the 1st day of each calendar month in which the plaintiff, mother, is granted the physical custody of said minor children; excepting only, that for and during the calendar months wherein the plaintiff, mother, shall be entitled to the physical custody of the said minor children dur-

ing only a portion of such calendar month, the defendant shall pay, and is hereby ordered to pay, proportionately for the support of said minor children, as follows: The defendant shall pay to the plaintiff, mother, on the 1st day of each such calendar month, such portion of said sum of $75.00 for each said child as the ratio of the number of days of said month during which she is entitled to the physical custody of each child, bears to 30; in other words, defendant shall pay to plaintiff proportionately on the basis of $75.00 per month for each child for such portion of the calendar month as the mother shall be entitled to the physical custody of each said minor child. Support payments shall be suspended during the period when the defendant is entitled to the physical custody of said minor children. The within order for support and maintenance of said minor children shall remain in effect until further order of the Court.

Plaintiff's application for temporary attorney's fees and costs is denied for the reason that plaintiff has not shown any need therefor.

Dated: March 16, 1955.

KURTZ KAUFFMAN,
JUDGE OF THE SUPERIOR COURT.

The clerk is ordered to enter this order.

Appendix F

IN THE
DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF GOODING

GERTRUDE B. NEWELL,

Plaintiff,

vs.

ROBERT M. NEWELL,

Defendant.

Case No.————

ORDER OF CONTEMPT

The matter of the Court's order to the Defendant, Robert M. Newell, heretofore issued herein, directing him to appear and show cause, if any he has, why he should not be punished for contempt of this Court for the violation of the order heretofore made herein on January 15, 1954, granting him certain possessory rights in a 1953 Buick Station Wagon, and why he should not be directed and ordered to surrender said Station Wagon as in said order provided, came on regularly to be heard on July 12, 1954, said Robert M. Newell being personally present in Court and also represented by John A. Carver, Jr. as counsel, and oral and documentary evidence having been introduced, and the matter having been submitted to the Court and the Court being fully advised in the premises, finds and decides:

That the Plaintiff herein brought said Buick Station Wagon into Idaho on or before July 7, 1953, and that said Station Wagon continued in her possession and in Idaho up until the time that Defendant drove said car from Idaho to California pursuant to said order of January 15, 1954.

That on Jnauary 15, 1954, upon the Court granting said Defendant the privilege of addressing the Court, said Defendant made a personal plea for the use of said Station Wagon, and in part, represented to the Court as follows:

> "I would like to have one car to use in my work in Los Angeles, and the car I would want it to still be subject to the jurisdiction of this Court, the rights in the car, whether the Court follows the California judgment or not. I have generally appeared in Idaho, the car will be before the Court to decide. All I want to do is to use it during the windup of this affair unless the Court follows the judgment and awards it to me exclusively. I need it in my business particularly because there is no public transportation from where I live. I teach law school two nights a week and have to be downtown in Los Angeles."

That said Defendant deceived the Court in that sometime prior to January 15, 1954, to induce the Bank of California to loan him money on the security of said Station Wagon, said Defendant represented that the car was temporarily out of the State and that he would have it back in two or three weeks.

That in said order of January 15, 1954, which order was entered at the request of said Defendant, this Court made the following provisions:

> "IT IS FURTHER ORDERED That the ruling of the Court upon defendant's motion for the awarding of the 1953 Buick Station Wagon be and hereby is reserved, but that defendant may have possession of the same, pending further order of this Court, provided,
>
> "AND IT IS FURTHER ORDERED That the Court does not determine the rights of the respective parties hereto in and to said Station Wagon, but reserves jurisdiction for such purpose and that defendant's right to possession is only until further order of this Court, and
>
> "IT IS FURTHER ORDERED That defendant be and hereby is directed and ordered to surrender said Station Wagon to the plaintiff or to the custody of the Court, upon Notice by the Clerk of the Court; and plaintiff is hereby ordered and directed to surrender said Station Wagon to said defendant under the terms and provisions of this order upon payment by defendant to said plaintiff of the $300.00 attorneys fees and suit money hereinbefore mentioned."

That said Defendant not only transferred the legal title to said Station Wagon in California as security, but traded the same upon a new Buick car and received in said trade in addition to such new car the sum of

$500.00, and in connection with said trade, said car was sold to a third person in excess of $3,200.00.

That the interlocutory ex-parte default decree entered by the Superior Court of Los Angeles County, California, under date of September 25, 1953, had no extraterritorial effect, and said Buick Station Wagon was not in the State of California at the time of the entering of such decree; and in any event, said Defendant has subjected himself to the jurisdiction of this Court, and particularly with reference to said Buick Station Wagon, regardless of said California decree.

That said Defendant by the sale of said Station Wagon has made it impossible to return the same to Idaho, but he contends that he should have notice and an opportunity to return the same.

That said Defendant has not accounted to the Plaintiff for her separate property which was traded in upon said Buick Station Wagon in the form of two cars which were her separate property, but this Court has no jurisdiction to make any order with reference to such separate property; however, the Court does determine that the community interest in said Buick Station Wagon amounts to $825.00, which the Court by decree herein will provide to be awarded to Plaintiff; that said Station Wagon should either be returned in order to effectuate such award, or the value of said community interest should be paid by Defendant to Plaintiff.

That Defendant is in contempt of this Court, and

in the event he does not purge himself as hereinafter provided, should be punished.

NOW, THEREFORE, IT IS HEREBY ORDERED That said Defendant, Robert M. Newell, be and hereby is adjudged guilty of contempt of this Court; and

IT IS FURTHER ORDERED That said Defendant may purge himself of said contempt if, within thirty (30) days from the date of this order, said Defendant either returns said Station Wagon to the custody of this Court, or pays to Plaintiff the sum of $825.00; and

IT IS FURTHER ORDERED That if said car is not returned or if said payment be not so made, said Defendant shall appear before this Court on the 31st day following the date of this order, or at such other time as the Court may fix, for sentence and pronouncement of judgment for such contempt.

DATED: August 31st, 1954.

D. H. SUTPHEN, District Judge

Appendix G

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
No. 629495

GERTRUDE B. NEWELL,

Plaintiff,

vs.

ROBERT M. NEWELL,

Defendant.

AFFIDAVIT IN SUPPORT OF ISSUANCE OF SUBPOENA RE DEPOSITION PURSUANT CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 2037

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

ROBERT M. NEWELL, being sworn deposes and says:

The above entitled action is an action for divorce filed by plaintiff, GERTRUDE B. NEWELL, against affiant in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Gooding, on the 21st day of August, 1953. Subsequently thereto affiant filed his answer to said complaint and said action is now pending before that court.

Affiant desires to take the testimony of the following witnesses by deposition:

(1) Victoria Schaffauser

(2) William A. Duvoisin

(3) Walter W. Ralphs, Jr.

The testimony of each of the above witnesses is material to affiant's defense in said action in that some of the issues, among others, are:

(1) The alleged adultery of plaintiff during the course of their marriage;

(2) Custody of the minor children of the parties;

(3) That plaintiff treated affiant with extreme cruelty during the course of their marriage.

Each of the above named witnesses will testify to facts material to these issues. Each resides in the County of Los Angeles, State of California.

A commission to take the testimony of said witnesses or any of them has not been issued. According to the law of the State of Idaho, where said action is pending, depositions of a witness or witnesses taken pursuant to California Civil Procedure Section 2037, will be received in said action.

Idaho Code Section 9-901 provides:

"Deposition of witnesses taken within or without the State may be taken according to the regulations provided before any judge, justice of peace, notary public, clerk or a court of record or commissioner appointed by court to take depositions . . ."

Idaho Code Section 9-905 provides:

"In all actions it may order the taking of depositions whenever deemed necessary to determine the rights of the parties or to expedite the trial of causes and may, if necessary, for that purpose, order a continuance until next term."

Idaho Code Section 9-916 provides:

"When a deposition is to be taken within or without the State but within the United States, no commission shall be necessary for taking the deposition . . . When taken out of the United States the Clerk shall, upon the request of the party taking the deposition, issue a commission to the officer or commissioner taking the deposition. No order of the Court or affidavit shall be necessary to authorize the issuing of the Commission.

Idaho Code Section 9-928 provides:

The provisions for taking of a deposition within the State where no commission has been issued are substantially the same as California C.C.P. Section 2037.

WHEREFORE, affiant prays:

(1) That subpœna re deposition issue requiring said Victoria Schaffauser, William A. Duvoisin and Walter W. Ralphs, Jr., to appear and testify before a judge of the above entitled court, a commissioner thereof, or any other officer or person designated by a Judge of the Superior Court, at a time and place specified in said subpœna.

ROBERT M. NEWELL

Subscribed and sworn to before me this 3rd day of June, 1954.

THEODORE A. CHESTER,
Notary Public in and for said County and State.

Appendix H

ADVANCE CALIFORNIA REPORTS
Cases Determined in the Supreme Court
Published Weekly by
The Recorder Printing and Publishing Co.
(L. A. No. 23337. In Bank. Aug. 3, 1956)

GERTRUDE B. NEWELL,

Appellant,

vs.

ROBERT M. NEWELL,

Respondent

(On hearing after decision by the District Court of Appeal, Second Appellate District, Division Two, Civ. No. 20574 (136 A.C.A. 792, 289 P. (2d) 32) affirming an order of the superior court. Appeal dismissed.)

(1) Appeal—Moot Questions.—The issues involved on appeal from an order of the superior court which restrained plaintiff from prosecuting a divorce action in another state, from taking depositions of persons for use in such action, and from taking steps in a court in any state, other than the California court, leading to a determination of the rights of minor children of the parties became moot, necessitating dismissal of the appeal, where it appeared from the briefs of the parties that plaintiff received a divorce decree in the other state which was affirmed by the Supreme Court of that state, that there was no action pending in that state in which depositions of California witnesses would be needed, and that custody orders were made by a Cali-

fornia superior court, superseding the custody order which was the subject of appeal, in which custody was awarded jointly to the parties.

APPEAL from an order of the superior Court of Los Angeles County restraining plaintiff from prosecuting a divorce action in another state, from taking depositions for use in such action, and from taking any steps in a court in any state, other than the California court, leading to a determination of the rights of custody of minor children of the parties. Elmer D. Doyle, Judge. Appeal dismissed.

Ernest W. Pitney and Glenn A. Lane for Appellant.

Theodore A. Chester for Respondent.

(1) See Cal. Jur. 2d, Appeal and Error, §533.

McK. Dig. Reference: (1) Appeal and Error, §18.

THE COURT. — Plaintiff, Gertrude B. Newell, appeals from an order of the Superior Court of Los Angeles County, made on June 23, 1953, which restrained her from prosecuting an action for divorce in Idaho against Robert Newell; from taking depositions of certain named persons or of any other persons for use in such Idaho divorce action; and from taking any steps in any court in any state, other than the California court, leading to a determination of the rights of custody of the minor children of the parties.

Before this case was placed upon our calendar for oral argument, we propounded four questions to counsel for the respective parties in an endeavor to ascertain whether or not the issues involved on this appeal had become moot. In response to the questions

propounded, briefs were filed by counsel for the respective parties.

(1) The briefs filed by the parties in answer to our questions show that Gertrude, plaintiff and appellant here, *received an Idaho decree of divorce on August 31, 1954, which was affirmed by the Supreme Court of Idaho on February 27, 1956. It follows, therefore, that the provisions of the restraining order prohibiting her from seeking a decree of divorce in Idaho are no longer an issue.* It also appears that there is no action pending in Idaho in which depositions of California witnesses would be needed. In answer to our question concerning the order presently in effect concerning the custody of the minor children of the parties, we are advised that on March 16, 1955, two identical custody orders were made by the Superior Court of Los Angeles County in which legal custody was awarded jointly to the parties. These two orders supersede the custody provision of the order which is the subject of this appeal. There are appeals presently pending in the District Court of Appeal from the orders of March 16, 1955.

We conclude, therefore, that there is no issue involved in this appeal which requires a determination by this court.

The appeal is dismissed.

McComb, J., did not participate herein.

Appendix I

IN DEPARTMENT 8 OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

GERTRUDE B. NEWELL,

Plaintiff

vs.

ROBERT M. NEWELL,

Defendant

Case Number 629775

DEFENDANT'S ORDER TO SHOW CAUSE RE RESTRAINING ORDER

MOTION OF DEFENDANT TO QUASH SUBPOENAE AND SUBPOENAE DUCES TECUM

HONORABLE ELMER D. DOYLE, JUDGE.

AFTER ORAL ARGUMENT, The motion of defendant to quash subpœnæ and subpœnæ duces tecum is granted; and plaintiff is restrained from taking depositions in this County to be used in the Idaho proceedings.

(Filed June 22, 1954. HAROLD J. OSTLY, County Clerk, by W. R. Turner, Deputy.)

W. H. BRANNERS, and E. W. PITNEY, Counsel for Plaintiff.

NEWELL and T. A. CHESTER, Counsel for the Defendant.

Appendix J

32-601 IDAHO CODE

DISSOLUTION OF MARRIAGE

Marriage is dissolved only:

(1) By the death of one of the parties; or,

(2) By the judgment of a court of competent jurisdiction decreeing a divorce of the parties.